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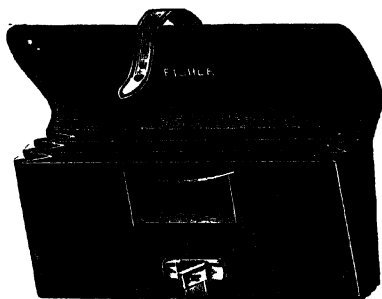
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# THE LAW MAGAZINE AND REVIEW.

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## I.—THE WEST RIDING JUDGMENT.

THE recent Judgment of the Court of Appeal in the case of *The King v. The County Council of the West Riding of Yorkshire* (now generally referred to as the West Riding Judgment) affords food for consideration from two points of view. The first is concerned with the Judgment itself as an exposition of the law upon the subject with which it deals; the second relates to the bearing of the decision upon other questions arising out of the Education Acts, but not in issue in the proceedings in question. The only point which the Court was called upon to decide was, to use the language of the Master of the Rolls, "whether the local education authority are liable to pay the expense of denominational religious instruction in non-provided schools under the Education Act 1902." The position taken up by the education authority is succinctly described by the same Judge as follows:—"The authority, admitting their liability to pay for secular instruction, contended that no duty was imposed upon them to pay for denominational religious instruction, and claimed on that ground to withhold such part of the teachers' salaries as might be deemed fairly referable to religious instruction." Section 16 of the Education Act 1902 provides that in case of failure on the part of a local education authority to fulfil any of their duties

under such Act, the Board of Education may, after holding a public enquiry, make such order as they think necessary or proper for the purpose of compelling the authority to fulfil their duty, and any such order may be enforced by *mandamus*. An order in terms of this section having been made by the Board of Education, the Divisional Court ordered a *mandamus* to issue to enforce obedience to the order of the Board enjoining payment of the proportion of salaries withheld. Upon appeal, the majority of the Court, consisting of the Master of the Rolls and Farwell, L.J., allowed the appeal, holding that the *mandamus* ought not to issue; whilst Fletcher Moulton, L.J., upheld the decision of the Divisional Court. The decision, it is obvious, does not directly determine the question whether payment of salaries in respect of religious instruction is within the powers of the education authority; in other words, whether such payment, if voluntarily made, would be *ultra vires* on the part of the authority; nor does it immediately relate to the position of such authority with respect to the payment for religious instruction given in provided schools in terms of the Cowper-Temple principle. Although neither of these important questions was directly involved in the decision, it is impossible to be blind to the fact that both are touched closely by the *ratio decidendi* as set forth in the reasoned Judgments of the majority Judges. Should it prove to be the case that such payments are absolutely beyond the powers of the education authority, and that the reasoning upon which the decision is based is equally applicable to the maintenance of undenominational religion in provided schools, then we are confronted with the startling revelation that the great majority of the School Boards throughout the country were from 1870 down to 1902 applying the funds at their disposal in an unauthorized manner, and that the various County, Borough and Urban Councils, as the education authorities substituted by the Act of 1902 for the extinguished School Boards, have

continued the same illegal practice down to the present time. When the decision is examined it appears beyond question that the *mandamus* was refused, not because to maintain or not maintain religious instruction in non-provided schools was a matter discretionary with the education authority, and therefore not the subject of a *mandamus*; but emphatically on the ground that no such duty was cast upon the authority by the Education Act 1902. The education authority, like their predecessors the School Board, are merely a statutory body possessed of such powers, and such powers only, as Parliament has assigned them. If, then, the Acts from which these authorities derive their powers do not render it part of their duty to maintain this species of education, we cannot see how payment for such purpose could be regarded by a Court as a legitimate application of the public funds entrusted to the authority for certain specific purposes, of which this is not one. In the case of *Regina v. Cockerton*<sup>1</sup> the then Master of the Rolls, A. L. Smith, said:—

If any School Board is to justify the payment of the expenses of education out of the money of the ratepayers, this must be done by producing some Act of Parliament which enacts that the ratepayers' money shall be levied and applied to that purpose, neither a code nor a directory has any such force.

If the decision under discussion remain binding, it is difficult to imagine how an education authority, voluntarily making these payments which, it is held, they are not bound to make, could escape the application to their procedure of the incontestably sound doctrine expounded in the passage quoted.

Of even greater importance in its practical effect is the question, does the reasoning upon which the decision is founded affect the power supposed to be possessed by the education authority of giving religious instruction of the Cowper-Temple type in provided schools? We propose

<sup>1</sup> L. R. [1901], 1 K. B., at p. 730.

to consider this question before proceeding to discuss<sup>f</sup> the Judgment<sup>e</sup> in relation to the precise point determined. Let us now turn to the Judgment itself. The Master of the Rolls, after stating briefly the point in issue, namely, whether it was compulsory upon the education authority to pay for the religious instruction in non-provided schools, proceeds:—

If the obligation exists, it is to be found in section 7 of the Act of 1902 and nowhere else. That section, therefore, must be carefully examined both by itself and by reference to its place in the chain of legislation on this subject-matter. The words of sub-section 1 are: "The local education authority shall maintain and keep efficient all public elementary schools within their area which are necessary, and have the control of all expenditure required for that purpose, other than expenditure for which, under this Act, provision is to be made by the managers."

Then we have the statement:—

Unless the words "maintain and keep efficient" cover denominational religious instruction, and unless denominational religious instruction is embraced in the concept "public elementary school," the section contains no mandate in relation to religious instruction at all.

Later on in his Judgment the Master of the Rolls says:—

It so happens that, apart from the considerations I have just pointed out, there is in the earlier legislation a key to the meaning of the words "maintain and keep efficient," on which the whole position of the respondents rests. The words are taken from section 18 of the Act of 1870, which is still (subject to a slight modification) unrepealed. "The School Board shall maintain and keep efficient every school provided by such Board."

We now pass by the intervening argument in order to reach at once the conclusion arrived at by the Master of the Rolls, which we give in his own words:—

The words therefore "maintain and keep efficient" in their original place in this legislation *did not embrace religious instruction*,<sup>1</sup> and, being chosen in the later Act, to define the obligation of the new authority, ought, it seems to me, to be construed in the same sense, unless there is something in the later Act to negative it.

If the words "maintain and keep efficient" in their original place did not embrace religious instruction, then necessarily the concept "public elementary school" being the object of

<sup>1</sup> The italics are ours.

the duty does not embrace religion of any kind, denominational or otherwise. Now, if the words "maintain and keep efficient" in the Act of 1870 did not embrace religious instruction, we are at a loss to discover the source from which the extinct School Boards, and their successors, the education authorities under the Act of 1902, derived their power to give religious instruction, even of an undenominational character, in the Board or provided schools. If any such power exists it must be found within the ambit of the Act of 1870, as no further powers in this respect are conferred by the Act of 1902. The School Boards, let it be remembered, were purely statutory bodies, owing their existence to the Act of 1870, whence alone they derived all such powers as they possessed. It is deserving of notice that there is nothing in the Judgment of the Master of the Rolls enabling one to say what his view was as to the duty or powers of the education authority with respect to religious instruction in provided schools; whilst Farwell and Fletcher Moulton, L.JJ., indicate quite clearly their opinion upon the subject. The words of the latter on this point are particularly significant in relation to our discussion. We give them in full:—

In considering the powers and duties of local education authorities, with regard to schools provided by them, it is not necessary to call in aid section 7, because section 5, by giving to such authorities all the powers and duties of School Boards, has given them ample power to do all that is required for the maintenance of Cowper-Temple instruction, including the power to use money, derived from the rates, for that purpose, *seeing that all this came within the powers conferred on School Boards by the Education Act of 1870.*<sup>1</sup>

It is much to be regretted that the learned Judge did not go further and point out the particular provisions of the Act of 1870 which he considered conferred these powers upon the School Boards. Had this been done, all danger would have been avoided of finding in this language any countenance of the erroneous notion that the Act of

<sup>1</sup> The italics are ours.

1870 explicitly empowered School Boards to give religious instruction of the Cowper-Temple type in their schools. Let it be remembered that we do not question the possession of such powers by the present education authorities as the lineal descendants of the defunct School Boards. On the contrary, our view is that such powers exist, but that their existence is incompatible with the sense in which the Master of the Rolls construes the expression "maintain and keep efficient" and "public elementary schools." Truly, as Fletcher Moulton, L.J., points out, section 5 of the Act of 1902 invests the new education authority with all the powers and duties of the old School Board; but the question still remains, what are those powers, and what provisions of the Act of 1870 can be vouched for their existence? To answer this question, a careful examination of the Act is necessary. We are told by the Master of the Rolls that the words "maintain and keep efficient" in their original place, that is to say in the Act of 1870, did not embrace religious instruction; and our proposition is that, if such be the meaning of this expression, then, there is nothing in the Acts which can be held to justify the inclusion of religious instruction in the curriculum of a provided school. This conclusion results inevitably from the fact that the powers and duties of a Board with regard to the provision of schools is strictly confined to public elementary schools. As to this the Act of 1870 speaks for itself. The Legislature, in 1870, determined to recognize the voluntary agencies at work in the educational field, and to make provision only for supplying existing and future deficiencies. First of all, we have in section 5 a declaration of the abstract principle that "there shall be "provided for every school district a sufficient amount "of accommodation in public elementary schools (as "hereinafter defined) available for all the children resident "in such district, for whose elementary education efficient

“and suitable provision is not otherwise made.” Then we have the practical application of the principle, following in the same section, “and where there is an insufficient amount “of such accommodation in this Act referred to as ‘public “‘school accommodation’ the deficiency shall be supplied “in manner provided by this Act.” Section 6 provides for the formation of a School Board in any district, by the Education Department, when they “in the manner “provided by this Act, are satisfied, and have given “public notice, that there is an insufficient amount of “public school accommodation” for such district; and the section further provides that the Board so formed “shall “supply such deficiency, and, in case of default by the “School Board, the Education Department shall cause “the duty of such Board to be performed in manner “provided by this Act.” We see thus that the very *raison d’être* of a School Board, in any town or parish, is the proved deficiency of accommodation in existing public elementary schools, and that it is created primarily for the purpose of supplying such deficiency. The more closely the Act is examined, the more abundantly does it appear, not only that this is so, but, further, that the powers and duties entrusted to the Board are strictly confined to making provision for supplying deficiencies in public elementary school accommodation. Of course, there are subsidiary and incidental powers such as that of rating, borrowing, and other functions incidental to the main duty to be discharged; but, so far as education itself is concerned, there is no hint of any function other than that of providing public elementary school accommodation. It must be kept constantly in mind during our discussion that the expression “public school accommodation” means “accommodation in public elementary schools.”<sup>1</sup> Where the Act deals with the functions of the School

<sup>1</sup> See sect. 5 already cited.



Board, it is ever kept clearly in view that it is public elementary schools with which the Board is concerned, and there is no trace of the bestowal, either expressly or by implication, of any further powers. In sect. 8 the Department is directed to "consider whether any and what *public school accommodation* is required for such district," and sect. 9 points out what notice is to be given in case of a deficiency of such accommodation. Should the deficiency not be supplied, by voluntary effort, in the district, then a School Board is to be called into being, and a requisition sent, requiring them "to take proceedings forthwith for supplying the public school accommodation."<sup>1</sup> It may be said, "Oh! all this deals only with the first formation of School Boards and in no way fixes the limit of the powers subsequently exercisable by them." Unfortunately, however, for this argument, not only is the Act silent as to the gift of these wider powers, but it lends no countenance to the notion of their existence. For instance, sect. 13, which regulates permanently the proceedings of the Department, with respect to the supply of schools for districts, including those where a School Board has been already established, confines their operations to the matter of "public school accommodation." We pass over sect. 18 for the moment, as it requires a more detailed reference, and direct attention to sect. 19, where we find that the School Board is empowered *inter alia* to "provide by building or otherwise school houses properly "fitted up and improved" and to "supply school apparatus "and everything necessary for the efficiency of the schools "provided by them;" but, to ascertain the true meaning and due limit of these powers, we must hark back to the opening words of the section, when it will be seen that they are expressly conferred upon the School Board "for the "purpose of providing sufficient public school accommodation "for their district." Looking at sect. 14 it appears at first

<sup>1</sup> See sect. 10.

blush as if it might furnish an argument in conflict with our view that a public elementary school is the only sort of school which a Board is empowered to establish. We quote the section with the first sub-section which alone are material to this point :—

14. Every school provided by a School Board shall be conducted under the control and management of such Board in accordance with the following regulations :—

- (1) The school shall be a public elementary school within the meaning of this Act.

It may be argued, and not without some plausibility, that, if a public elementary school is the only class of school which can be provided by a Board, there would be no necessity for the provision that every school so provided shall be conducted as a public elementary school, and that consequently the insertion of this provision implies that a school which a Board can provide may embrace more than a public elementary school, this section merely insisting that any school provided must be conducted in accordance with the conditions requisite to constitute it a public elementary school. Whatever force there may be in this argument it can, in our opinion, have little weight as against the fact that the enabling sections of the Act extend only to the one class of schools. Surplusage in Acts of Parliament is not of infrequent occurrence, and it certainly would offend less against any known canon of construction to treat the provision as such, than to interpret it as conferring upon the School Boards, by implication, powers beyond the very purpose for which they were created. Moreover the difficulty is rather apparent than real. The section in question is one of a group with the heading "Management and maintenance of schools by School Board," and deals with the duties of management as distinct from the duty of providing schools. In this connexion the Legislature may well have deemed it expedient, even if not absolutely necessary, to emphasise,

even at the risk of repetition, the fact that the school must be conducted as a public elementary school.

Probably the foregoing references furnish a sufficient outline of the aim and general scheme of the Act of 1870 to enable us now to appreciate duly the meaning and effect of sect. 18 considered as an integral part of the legislative plan embodied in the Act. We give the material part of the section in full:—

18. The School Board shall *maintain and keep efficient every school* provided by such Board and shall from time to time provide such additional *school accommodation* as is, in their opinion, necessary in order to supply a sufficient amount of *public school accommodation* for their district.<sup>1</sup>

The question has been raised whether significance is not to be attached to the employment of the word *school* instead of “public elementary school” in the first sentence of the section. The contention is that the words “shall maintain and keep efficient every school” refer to the school as a whole, and cover both religious and secular education, and have a wider meaning than the term “public elementary school” in sect. 14. This position appears to us quite untenable. In seeking the meaning of the expression “school provided by such board,” we must ask and answer the question, what sort of school is the Board empowered to provide? The answer is, a public elementary school only, *ergo*, the school here intended is a public elementary school. Any other conclusion inevitably lands us in the absurdity, that the Board is enjoined to maintain and keep efficient a school which it is beyond its powers to provide. But we really need not travel outside the first paragraph of this very section to find the answer to the theory which we are disputing, as the injunction to the Board to provide from time to time additional accommodation is confined to such “as is, “in their opinion, necessary in order to supply a sufficient “amount of *public school accommodation* for their district.”

The word “school” appears to be used in this and other parts of the Act purely for the sake of brevity, and as a

<sup>1</sup> The italics are ours.

synonym of public elementary school. In the mandate to maintain and keep efficient, the abbreviated form "school" is employed, there being no danger of error, as the Board had no power to provide other than public elementary schools; when, on the other hand, the mandate is to provide additional accommodation, the purpose for which it is to be provided, viz., that of a public elementary school, is expressly indicated by use of the fuller term.

The heading to sects. 5 and 6 is "Supply of Schools," yet the sections relate exclusively to public elementary schools. In the same way sects. 8 to 13, which provide the machinery for the supply of such schools, and such schools only, are headed "Proceedings for supply of schools." An examination of the Act will disclose other instances of the same choice of language. A similar line of argument was taken before the Court of Appeal with respect to the Act of 1902, but was effectively disposed of by Fletcher Moulton, L.J.

If the foregoing considerations satisfy us that a public elementary school is the only school which a Board can provide, and the only school, therefore, which it can maintain and keep efficient, let us apply the language of the Master of the Rolls to this conclusion and see what the result is. "The words therefore" (he says) "maintain and 'keep efficient in their original place in this legislation" (viz., sect. 18 of the Act of 1870) "did not embrace religious instruction." Assuming the soundness of the Judgment, there is only one conclusion possible, viz., that the School Boards never had, and the present education authorities have not any power to give religious education of any kind in provided schools. As the Education Bill now before Parliament is, confessedly, based upon the assumption that it is within the competency of education authorities to give religious instruction in provided schools, subject to the Cowper-Temple restrictions, a rude awakening lies in store for the advocates of what is spoken of as simple Bible

teaching should the Judgment stand, and our view of its effect be correct. As, however, we write from the lawyer's and not the politician's standpoint, this is a matter with which we have no concern, except indeed in so far as a realisation of the full effects flowing from the Judgment may assist us in the task of testing its claim to acceptance as a sound exposition of the law.

Our own conviction is that the decision cannot be sustained, and that it is the reasoning of the dissentient Judge, Fletcher Moulton, L.J., which should prevail. The task remains for us to make good this position by such criticism of the reasoning upon which the judgments of the majority are based as may be compatible with the limits of our space.

The claim for the *mandamus* was based upon sect. 7, sub-sect. (1) of the Act of 1902, which provides that:—

The local education authority shall maintain and keep efficient all public elementary schools within their area which are necessary, and have the control of all expenditure required for that purpose other than expenditure for which, under this Act, provision is to be made by the managers; but in the case of a school not provided by them, only so long as the following conditions and provisions are complied with.

Then follow a number of further sub-sections to which, or some of which, reference will be made in the course of the argument.

To arrive at a sound interpretation of this provision it is essential to fix the meaning of the term "public elementary school" in the context where it stands. What is the public elementary school which is to be maintained and kept efficient? Sect. 24 (1) of the Act of 1902 helps us no further than to refer us to the Elementary Education Acts 1870 to 1900 for the interpretation of "any expression to which a special meaning is attached in" those Acts. It is then to the context of the Acts taken as a whole that we must look for the meaning of particular expressions employed in their various provisions. Now how does the

Master of the Rolls deal with this crucial point? We must repeat his own words:—

Furthermore, the use of the words “public elementary schools,” as the object of the duty, founds another argument for the same contention. The definition and description of *such* a school in sections 3 and 7 of the Act of 1870, coupled with section 14 of that Act, exclude the teaching *there* of any catechism or religious formulary which is distinctive of any particular denomination, and the mandate of section 7 of the Act of 1902 is made applicable to *such* a school only.<sup>1</sup>

We have here a distinct annunciation of the startling proposition that the Act of 1870 so defines a public elementary school as to exclude the teaching *there* of any catechism or religious formulary distinctive of any particular denomination. How then have all the voluntary schools been in receipt of parliamentary grants from the passing of the Act of 1870, since in these schools such catechisms and religious formularies are avowedly and notoriously used as the instruments for imparting the religious instruction? These schools must have answered the description of public elementary schools, inasmuch as sect. 96 of the Act provides, that “after the 31st day of “ March 1871 no parliamentary grant shall be made to any “ elementary school which is not a public elementary school “ within the meaning of this Act.” If the Master of the Rolls is right, then, not only, as already shown, have the School Boards been acting *ultra vires* in the maintenance of undenominational religious instruction in Board Schools, but the Education Department has been systematically ignoring the 96th section of the Act of 1870 by paying grants to schools which *ex hypothesi* are not public elementary schools at all.

The Master of the Rolls has, we venture to think, entirely misconceived the effect of the sections to which he refers. What has been lost sight of is that, under the Act of 1870, there are two distinct classes of “public elementary schools”

<sup>1</sup> The italics are ours.

recognized as eligible for the parliamentary grant, and that no grant can be made to any school which does not fall within the one or the other category. The two classes of public elementary schools are (1) schools provided by a School Board, commonly called Board Schools; and (2) schools not so provided and commonly called Voluntary Schools. Sect. 7 of the Act of 1870 contains a series of general provisions relating to both classes of schools. It regulates the time for such instruction, and lays down certain conditions under which it is to be given, but it contains no reference to the nature or character of the instruction. On the other hand, if we turn to sect. 14, we find a set of provisions not applicable to all "public elementary schools," but (to use the words of the heading to the section) to the "Management and maintenance of schools by School Board," and here in sub-sect. (2) we get the famous Cowper-Temple provision prohibiting the use of a "religious catechism or religious formulary distinctive of any particular denomination." It will be seen, therefore, that the use of a distinctive catechism or formulary is not, as assumed in the Judgment, excluded from "public elementary schools" as such, but only from one class of such schools, namely, those provided by a School Board. The mandate of sect. 7 of the Act of 1902 is consequently not "made applicable to such a school only" but to all public elementary schools, a description which includes schools in which a distinctive catechism and formulary may be used as well as those in which they may not be used. In a subsequent part of his Judgment the Master of the Rolls, in speaking of the terms "public elementary school" and "denominational religious instruction," speaks of "the statutory definition of the term as excluding such instruction," thus showing how largely his decision was influenced by this conception of the meaning of the expression "public elementary school."

We give in the language of the Master of the Rolls himself the description of another difficulty found by him in the contention on behalf of the Crown :—

It involves the use of the words “public elementary school” in two different senses, as in the one case excluding and in the other case including denominational religious instruction, and this although the statutory definition of the term as excluding such instruction remains unchanged.

Why, one naturally asks, should not the words “public elementary school” be used in two different senses? If the genus be public elementary schools and the species (1) provided schools and (2) non-provided schools, is there any impropriety of language, when the maintenance of both species in their different ways is enjoined, in speaking of the schools by the title which includes both? Would an order, for instance, requiring all ships putting to sea to be properly manned and equipped err in nicety of language because the expression ship would include sailers and steam ships, whilst the requirements would be very different in the two cases?

The general trend of the line of argument adopted by the Master of the Rolls cannot be better stated than in his own words :—

The net result would seem to be that the obligation to maintain and keep efficient was extended only to the common element in the two classes of schools.

But why to the common element only? Sect. 7 (1) of the Act of 1902 does not say so. If this had been the intention, nothing could have been easier than the insertion of the few words which would have placed the matter beyond cavil. Instead of doing so, the Legislature simply describes the institutions to be maintained as public elementary schools, which *prima facie* at any rate, means such schools in their entirety, to whatever class they may chance to belong, and not some element in the school which it may share in common with the other class of such schools. When the Legislature has in view the secular



instruction in the school, and seeks to distinguish this from the work of the school as a whole, it takes care to do so in a quite explicit fashion. In the sub-sect. (1) (a) of sect. 7 the managers of the school are required to carry out any directions of the local education authority as to *secular instruction* to be given in the school. If, as held by the Master of the Rolls, the mandate in sub-sect. (1) to "maintain and keep efficient" applies exclusively to the common element of both classes of schools, namely the secular instruction, one would have expected to find the object of the mandate described as the secular instruction to be given in public elementary schools. It is impossible in construing a statute to ignore the significance of so marked a variation in language as this.

If, as we claim to have done, we have succeeded in showing that schools in which distinctive religious catechisms and religious formularies were taught were public elementary schools, and, as such, in receipt of parliamentary grants down to 1902, upon what ground, we ask, can the expression "public elementary school" when employed in the Act of that year be construed as meaning something different, that is to say, the school in its secular aspect alone.

From the first issue of a code, regulating parliamentary grants for education, down to the passing of the Act of 1870, religion was insisted upon as a condition of obtaining a grant. The revised code (1870) issued immediately prior to the Act provides in Article 8:—

Every school aided from the grant must be either—

- (a) a school in connection with some recognised religious denomination ; or
- (b) a school in which, besides secular instruction, the scriptures are read daily from the authorised version.

The Act of 1870 undeniably effected fundamental changes in the system. It gave us for the first time the conscience clause and the expression "public elementary school."

Sect. 7 rendered religious instruction no longer compulsory; it ceased to be a necessary condition of the right to the grant, and became accordingly an optional subject which might or might not be taken as part of the curriculum of the school as the managers of each individual school should, in their absolute discretion, determine; and the duties of the Inspector were restricted to the secular instruction of the school. That religion was, however, contemplated as remaining a part of the instruction in the school, subject to the power of exclusion on the part of the managers, is put beyond question by the provisions of the Act regulating the mode of giving such instruction. By sect. 7 (2) it must not be given except at the beginning or the end or the beginning and the end of the school meeting, and such time must be inserted *in a time table to be approved by the Education Department*. The use of the expression in this section "given at any meeting of the school" is significant as showing that the religious instruction was regarded as part and parcel of the general work of the school, to be given during the ordinary school hours as shown, like the secular subjects, in a time table, approved by the Inspector. Fletcher Moulton, L.J., calls attention to the inference to be drawn from the use of similar language in an analogous connection in sub-sect. (1) (a) of sect. 7 of the Act of 1902. All grant-aided schools before 1870, as we have seen, necessarily included the giving of religious instruction in their curriculum, this being required by the regulations of the Department. Because the Act of 1870 dispensed with this requirement, as a necessary condition of earning the grant, and provided that an elementary school, albeit no religion be given there, may be a public elementary school notwithstanding, seems to afford no ground for the contention that, therefore, the term "public elementary school" excludes religious instruction. To get at the root of the matter, one has to face the question what may be legitimately compre-

hended in the concept of a public elementary school,\* and not merely what attributes satisfy this designation. With respect to the Voluntary Schools prior to 1902 the matter was simple enough. An elementary school conforming to the statutory conditions, was *ipso facto* a public elementary school, and it mattered not, so far as the law was concerned, what it was outside the limits of the sum total of the requirements which the law demanded. It was a vastly different matter with respect to the Board or provided schools. These are statutory institutions in their entirety, erected under legislative powers, at the cost of the rate-payers. What, then, in quantity and quality of education is within the compass of the powers conferred upon the School Boards by the Act of 1870 and now possessed by the education authority? Such light as is to be had upon this somewhat abstruse topic is, so far as judicial sanction exists, to be found only in the Cockerton Judgment, from which it would appear that the matter must be determined from the whole tenour of the Act. The Judgment of Mr. Justice Willes<sup>1</sup> may be studied with advantage in this connection:—

It is quite clear to my mind that they (the School Board) are under no obligation to go beyond the subjects and the amount of education required by the education code to earn a parliamentary grant. The extent of this obligatory teaching, though a varying quantity, has always been extremely moderate; but I see no indication of anything like a definite superior limit to what may be taught except in so far as such a limitation is involved in the proposition which I hope in due course to make clear—namely, that the only education contemplated by the Act as within the provision of the School Boards is education for children.

The Court of Appeal, as in duty bound to do, excluded from the argument all reference to speeches made in Parliament during the passing of the Bill of 1902, at the same time Farwell, L.J., emphasised the well-known canon of construction that:—

The Court must, of course, in construing an Act of Parliament, as in construing a deed or will, do its best to put itself in the position of the

<sup>1</sup> See L. R. [1901], 1 K. B., p. 339.

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authors of the words to be interpreted at the time when such words were written or otherwise became effectual.  
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It is of the first importance to keep in view this wholesome rule of construction in interpreting the Act of 1870. The then existing elementary schools, as already pointed out, were schools of which religious instruction was a necessary and prominent feature. These schools did not cover the whole ground, and the Legislature, recognising the necessity of supplying the deficiency, creates machinery for the purpose of providing additional accommodation in elementary schools, which now for the first time receive the title of public elementary schools. At the same time, all schools receiving a grant are placed under regulations in the giving of religious instruction; but, except in the Board Schools, the character of the instruction is interfered with in no respect whatever, and in the Board Schools only by the Cowper-Temple provision. It is impossible to read the Act without being impressed by the conviction that in all these schools—constituted, let it not be forgotten, public elementary schools by the Act itself—religious instruction, though no longer compulsory, was contemplated as forming part of the ordinary curriculum of the school. It is not altogether undeserving of notice that in the numerous provisions of sect. 7 of the Act of 1870 nowhere is there observable a suspicion that there would be schools without religious instruction, the language of the several sub-sections being such as to suggest that such instruction there would be, but that it was to be subject to certain restrictions. There is a remarkable illustration of this in sub-sect. (2) which, as already pointed out, requires the hours for such instruction to be inserted in a time table to be kept affixed in *every school room*, and not, mark, merely in every school room of a school where such instruction is given. Trifling as such a circumstance may be, still it is in the nature of a straw tending to show how the wind blows.

So far, then, as the history of the subject-matter helps us, a public elementary school of the Education Act 1870 presents itself as no other than the elementary school of the pre-statutory days, with certain new specific indispensable characteristics super-imposed, of which only those relating to religious instruction here concern us. Obviously the Board could decide to comply only with the minimum demands of the law, and so provide so much and such sort of instruction as would entitle the school to rank as a public elementary school. On the other hand, should the Board exercise its powers to a more ample extent, but still within the limits of the Act, and establish a school, embracing in its curriculum more than the minimum requirements of the Act for the attainment of this classification, whether such excess be of secular or religious instruction, such school still remains as a whole a public elementary school and nothing more. When, then, the Board is directed to maintain and keep efficient every school—which, we claim to have established, must mean every public elementary school—provided by such Board, the object of this obligation must necessarily be the school in all its curriculum. It is for these reasons that we differ from the conclusion of the Master of the Rolls that the words “maintain and keep efficient in their “ original place in this legislation did not embrace religious “ instruction.”

This somewhat lengthy and, we fear, tedious dissertation upon the position of the old School Boards, with respect to their schools, has appeared to us indispensable to a right construction of the provisions of the Act of 1902, which for the first time imposed upon a public authority the duty of maintaining, at the public cost, public elementary schools under private management. The Legislature of 1902, in approaching the subject, were confronted with the problem of the existence of a number of voluntary public elementary schools, greater considerably than that which

existed in 1870. The continuous levelling up of the standard of education, enforced by the Education Department, acting under the pressure of public opinion, created financial difficulties with which these schools felt themselves becoming yearly less and less able to cope. Hence the Education Act of 1902. The governing principle of the Act is financial assistance by the method of rate aid. It is in the light of this principle that the meaning of the Act is to be found. The new local education authority succeed to all the powers and duties of the School Boards, which they supersede,<sup>1</sup> with regard to the management of provided schools, subject to certain provisions for appointment of subordinate managers; but not so in the case of non-provided schools, with respect to which no general powers of management are vested in the authority. The *status quo* of these schools remains unchanged, except in so far as it is expressly modified or interfered with by direct enactment.

Whilst an important change is introduced into the constitution of these bodies of managers, and their subordination in specified particulars to the education authority is declared, their position otherwise is clearly retained, as may be gathered from sub-sect. 7 of sect. 7, as well indeed as from the whole purview of the Act. This sub-section provides that "The managers of a school maintained but "not provided by the local education authority shall have "all powers of management required for the purpose of "carrying out this Act, and shall (subject to the powers "of the local education authority under this section) "have the exclusive power of appointing and dismissing "teachers." The powers of interference on the part of the education authority are, when the Act comes to be examined, found to be of an extremely limited character, and the rights of the managers, it will be seen, are scrupulously safeguarded, especially with respect to religious instruction.

<sup>1</sup> See sect. 5.

The managers<sup>1</sup> are bound to carry out any directions of such authority as to the *secular instruction to be given in the school*, including directions as to the number and educational qualifications of the teachers to be employed for such instruction, and for the dismissal of any teacher on educational grounds, but the controlling power here given is made subject to the important condition that no directions "shall be such as to interfere with reasonable facilities for religious instruction during school hours." Then again we find in the same sub-section, that although the consent of the education authority is required to the appointment of teachers, such consent is not to be withheld except on "educational grounds," and in case of dismissal the consent of the authority is not needed if "the dismissal be on grounds connected with the giving of religious instruction in the school."

Sufficient has been said, probably, to justify our position that the Act of 1902 does not purport in any sense to transfer the management of non-provided schools to the education authority, but merely vests in such authority certain controlling power with regard to secular instruction.

We have now fairly before us the sort of school which the Legislature had in mind in 1902 when framing the mandate of sect. 7. The local education authority are to maintain and keep efficient "all public elementary schools" and *primâ facie* the phrase public elementary schools connotes the schools known as such and possessing the necessary qualifications of such at the time. The Judgment on the other hand, in construing sect. 7, says, in effect, you must not take the term in this its natural full and *primâ facie* sense, because in the connection in which it is here used it does not signify the substantive, concrete entity—the public elementary school—but the school merely in one sphere of its operations, namely, the function of

<sup>1</sup> See sub-sect. (1) (a) of sect. 7.

imparting secular instruction. With the most profound respect for the distinguished judges from whom it is our misfortune to differ, we confess our complete inability to discover either in the history of the subject-matter, or the language of the Acts, any adequate grounds for the adoption of this non-natural interpretation. The opposite view is put by Fletcher Moulton, L.J., in a passage quoted below, with a force and lucidity to our mind quite irresistible:—

In my opinion, it is impossible to construe the phrase “public elementary school” in section 7 otherwise than as including the school throughout the whole of its work, including the religious instruction given therein. It is clear from section 7, sub-section (1) (a), that it is intended that this religious instruction should be given during school hours, which raises a strong *prima facie* case for the view that it was intended to be part of the school work. But there are still more direct indications of this. The religious instruction is specifically described as being given in the school. One instance of this is to be found in sub-section (1) (c), which provides that the consent of the authority shall also be required to the dismissal of a teacher, unless the dismissal be on grounds connected with the giving of religious instruction in the school.

The Lord Justice further points out how this view is emphasised by sub-sect. 6, requiring that the religious instruction to be given in non-provided schools “shall, as regards its character, be in accordance with the provisions “(if any) of the trust deed relating thereto and shall be “under the control of the Managers,” and then proceeds:—

Comparing this with the express provision in section 5, that the local education authority “shall have the control of all secular instruction in public elementary schools not provided by them,” leads one irresistibly to the conclusion that the secular instruction and the religious instruction given in non-provided schools are considered each of them as part of the work of the school, and as together making up the whole work.

The Judgments of the Master of the Rolls and Farwell, L.J., appear to be based largely upon the conclusion at which they arrived as to the meaning of the words of sect. 7, sub-sect. (1), relating to the control of expenditure. After imposing upon the education authority the obligation to maintain and keep efficient all public elementary schools, this sub-section proceeds to give the authority



“the control of all expenditure required for that purpose.”  
Farwell, L.J., puts it in this way :—

Further, it is plain at any rate that *the duty to keep efficient and the control of expenditure for that purpose are absolutely co-extensive*. If the local education authority are bound to find the money for religious education, *they are equally bound to control its expenditure in such a way that the religious education is efficient*.<sup>1</sup>

The Master of the Rolls in the same connection says:—

It is quite clear, therefore, that control of religious instruction is expressly vested elsewhere than in the local authority in the case of non-provided schools, and on the *prima facie* construction of section 7 above pointed out, control being negatived, the obligation to maintain is equally inapplicable.

In both of these quotations the control of instruction is treated as involved in the duty of control of expenditure imposed upon the education authority by sect. 7 (1). As we understand the argument it runs thus.—The duty to control expenditure and the duty to maintain are co-extensive. The duty to control the expenditure involves the duty to control the instruction which is to be paid for out of such expenditure. The control of religious instruction is clearly not a duty of the education authority, it being expressly vested in the managers. Therefore, the duty to maintain does not include religious instruction. If this chain of reasoning can be maintained the Judgment is of course unassailable. Our conviction is that it cannot. We dispute the second proposition, that the duty to control the expenditure involves the duty to control the instruction, and the whole argument stands or falls by this proposition. The control of all expenditure gives to the education authority the first and final word with regard to all expenses to be incurred and all payments to be made in respect of the maintenance of the school. Salaries of teachers, apparatus, material, fire, lighting, cleaning, and all the various items which go to make up the total cost of maintenance, are placed under the absolute control of the authority. Surely

<sup>1</sup> The italics are ours.

such powers are sufficient to satisfy the meaning of the word control? There is no indication in the sub-section that control of the instruction, either secular or religious, is here contemplated. The control of the instruction is provided for in quite other ways. In the case of provided schools the control of the instruction is vested in the education authority as the successors of the Boards, by virtue of sect. 5. The like control in the non-provided, but maintained schools, belongs to the managers, subject only to certain conditions particularised in the Act. These considerations point unmistakably to the conclusion that the control here intended is financial purely and altogether outside the question of instruction. It seems to us that we may reach the same result by another and shorter route. The view that control here embraces the secular instruction and is co-extensive with the duty "to maintain and keep efficient," places the sub-section in direct antagonism to the whole tenour of the remainder of the section. The obligation to maintain and keep efficient, whatever the scope of its object may be, is at any rate absolute *quoad* that object; whilst, as already shown, the management of the Voluntary Schools remains with the managers, subject only to what is at most but a qualified power of control conferred on the education authority. If the control here vested in the education authority is, in the words of Farwell, L.J., "absolutely co-extensive" with the duty "to maintain and keep efficient," the conclusion seems irresistible that it can then have no concern with the giving of even the secular instruction in non-provided schools. Under any other construction the result would be that the Act by sub-sect. (1) of sect. 7 transfers to the education authority the complete control of the secular instruction in the non-provided schools, and then by a series of further sub-sections proceeds to confer upon the same authority a number of lesser powers with regard to such instruction already included in the larger power originally conferred.

We can see no valid argument, deducible from the provision for control of expenditure, inconsistent with the theory that the mandate to maintain and keep efficient is applicable to a non-provided school in all sections of its legitimate work and is not confined to the merely secular aspect of its operations.

If it be objected that, the inspector being forbidden to examine as to religious instruction, there is no method prescribed for testing the efficiency of such instruction, our reply is that there is the mandate to keep the whole school efficient, and in the words of Fletcher Moulton, L.J. :—

This would at least authorise and require it (the education authority) to provide adequate funds for the purpose ; and it may have been thought that the denominational managers might safely be trusted to keep efficient this part of the education, seeing that it was at the public cost.

There are just one or two other points which, even at the risk of proving wearisome, we feel constrained to touch upon before concluding, though space will but admit of our doing so in the briefest fashion. The Master of the Rolls fixes upon the admission, made by the Attorney-General in his argument, that a *mandamus* would not lie to compel the local education authority to provide and pay for religious instruction in a provided school, and argues from this that as the mandatory words apply equally to both classes of schools the same principle must apply. The answer to this argument seems obvious. No one contends that religious instruction is compulsory in schools of either class. The managers of each school have the discretion and must decide; and if the education authority as the paramount authority in their own schools determine to have none there is an end of the matter, of course no *mandamus* lies; but in the case of the non-provided schools the discretionary power as to the inclusion or exclusion of religious instruction rests, not with the education authority, but with the managers; and if they constitute such instruction a part of

the work of the school the duty of the education authority, in our view of the case, is to maintain and keep efficient such instruction.

The difficulty of conceiving that the Legislature intended to introduce into our elementary school system the strange novelty of apportioning teachers' salaries in respect of the secular and religious instruction which they imparted, is a subject with which Fletcher Moulton, L.J., deals in a convincing fashion. Space will not allow of our transcribing verbatim his remarks, whilst an epitome would fail to do them justice. Those interested in the controversy must read them for themselves. It is impossible to leave unnoticed the argument of Farwell, L.J., founded upon sect. 97, sub-sect. (1) of the Act of 1870, which provides that the annual parliamentary grant "shall not be made in respect of any instruction in religious subjects." The learned Judge manifestly assumes that a grant *payable in respect of* a subject, is the same thing as a grant made towards the teaching of it. He thus infers that "the Legislature recognises the principle as sound and just that no parliamentary grant should be made towards denominational religious teaching," and asks, "how can the Court assume that it intended not to apply the same principle to rates made for educational purposes under the authority of the Act?" We might feel disposed to say because Parliament has not said so, and, in face of the fact that rates have been so used in all but a trifling minority of the Board Schools since 1870, we should expect so important an alteration of the law to find expression in language of unmistakable import.<sup>1</sup> We cannot agree with the view taken by the learned Judge that there is any necessary connection between the subject *in respect of* which a grant

<sup>1</sup> It will be observed that the assumption of the Lord Justice involves the illegality of applying rates towards Cowper-Temple teaching. Although he here uses the expression *denominational religious instruction*, sect. 97, forbidding the grant, says nothing about *denominational*.

is given and the specific purpose to which the money is devoted. All moneys received by a School Board, whether as fees from scholars, or out of moneys provided by Parliament or in any manner whatever, are required by sect. 53 of the Act of 1870, to be carried to a fund called "the school fund." All expenses of the Board are ordered by the same section to be paid out of such fund, and the section concludes with the provision "and any deficiency shall be raised " by the Board as provided by this Act." Under such a system of finance, which is now binding upon the education authorities, there can be no specific appropriation of particular receipts.

The motive of sect. 97, sub-sect. (1) presents no difficulty. Religious instruction having been made entirely voluntary, and the inspection of such instruction discontinued, the coping-stone of the policy is added by prohibiting grants in respect of such teaching.

G. A. RING.

## II.—THE EXEMPTION OF PRIVATE PROPERTY AT SEA FROM CAPTURE IN TIME OF WAR.<sup>1</sup>

WE all rejoice to note the progress, during the last forty years, of the cause of international arbitration. This Association from the outset has given its best help to that movement. But, undoubtedly, the same period, even to its close, has proved that war is still an event which must be expected to recur. It has seemed to me, therefore, neither useless nor unseasonable, in the cool atmosphere of present peace, favouring fair discussion, to submit to this Conference, a few remarks upon the subject of a change in the rules of maritime warfare which has received considerable support

<sup>1</sup> A paper read by the Hon. Sir William Rann Kennedy, one of the Judges of the High Court of Justice, at the Conference of the International Law Association, at Berlin, October 3rd, 1906.

in many quarters. It is an important as well as a very debatable topic. I dare to hope that everyone here will try to examine it, so far as is justly possible, from a cosmopolitan standpoint, and not merely, or chiefly, in relation to the supposed gain or loss of the particular country to which he may belong. "Nothing is more common than to confound, and yet nothing is more important than to distinguish, that which strictly belongs to the province of law and that which properly pertains to the domain of policy. Policy might possibly suggest that which law, nevertheless, disallows; and, on the other hand, law might permit what policy, notwithstanding, would dissuade."<sup>1</sup> We are not gathered together in this room, as diplomats meet at the Hague, to compose matters of international controversy, clothed with the dignity of national representation and charged with the special and sacred care of national interests. Ours is a different and a humbler rôle. We are merely volunteers from many nations, associated in the desire to further the common good of all by contributing, through suggestion and discussion, to the improvement of the law which ought to govern the dealings of humanity in time of war as well as in time of peace.

There is no doubt that, whereas, since the year 1856, in the case of war between any of the Powers who have acceded to the Declaration of Paris, the neutral flag has covered enemy's goods, with the exception of contraband of war, a belligerent is acting in strict accordance with International law who captures at sea and, through proceedings in a competent prize court, confiscates and sells the merchant ships of subjects of the enemy State, together with any goods belonging to such subjects as the ships may contain, and makes prisoners of their crews. The proceeding in the prize court is an inquest held upon the captured property

<sup>1</sup> *Letters by Historicus on International Law* (London and Cambridge, 1863), p. 3.

in order to discover whether it has been lawfully captured or not. It is especially a safeguard against the violation of the rights of neutrals. But in the case of ships captured at sea, and their cargoes, if they do belong to the enemy, there is no doubt that the property in them passes to the State of the captors directly that an effectual seizure has taken place; and it is therefore legal, in certain circumstances, to destroy the prize instead of taking it into port. Such circumstances are the practical impossibility of the latter course, owing to the storminess of the weather and the unseaworthy condition of the prize; the imminent risk of recapture by the enemy; the great distance of any port to which the prize could be taken; and the inability of the captor to spare a sufficient prize crew. In such cases the destruction of the prize is held to be justifiable, on the ground of necessity; and one cannot but fear that the preciousness of her coal to the modern cruiser, the great injury to her fighting power from any serious diminution of her crew, and the growing indisposition of neutrals, which Hall notes, to admit prizes within the shelter of their waters, will tend in the future to multiply the cases in which a captor will judge that his duty compels him not to attempt to bring the captured vessel into harbour. But modern feeling is against the propriety of destroying a prize, unless very good ground can be shown for it; and Hall states<sup>1</sup> that the practice of the English and French navies has always been to bring in captured vessels in the absence of strong reasons to the contrary. I do not think that the government of any belligerent State now would instruct its naval officers, as America did at the outbreak of war with Great Britain in 1812, to "destroy all you capture, unless in some extraordinary cases that shall clearly warrant an exception."<sup>2</sup>

<sup>1</sup> *International Law*, 5th edition, p. 458.

<sup>2</sup> Hall, *ib.*, p. 457.

The right of capture and, if necessity dictates such a course, of destruction, in regard to enemy's property at sea, is subject, so far as I am aware, to few recognised qualifications. The immunity of hospital ships and their contents is in the position of a rule which governs those nations who adhere to the Hague Convention of 1899 on Maritime Warfare. I cannot doubt that this immunity will obtain universally in practice among civilised nations. The immunity of in-shore fishing boats appears to me, if one may presume to differ from the opinions of some foreign jurists, to be rather a precept of international comity than a rule of International law. Certainly it is not an absolute rule. Any obligation ceases if there is an actual user of such vessels for naval purposes, *e. g.*, as spies or transports, or reasonable grounds can be shown for an apprehension of such user. Deep-sea fishing—*la grande pêche*—has never enjoyed even conditional immunity; but of the indulgent treatment, in these days of less vigorous warfare, both of all kinds of fishing boats, whilst in use as such, and of vessels engaged in scientific discovery or in carrying cargoes of works of art or educational instruments and material (for which isolated precedents already exist) one may, I think, rest assured. And the same may be said as to the practice of granting a period of grace to such enemy merchant ships as happen to be in the port of a belligerent at the outbreak of war or arrive there within a limited period after its commencement. Humanity of conduct, as was shown in the recent Spanish-American war in regard to privateering, often anticipates law.

The capture of private property by the enemy at sea is an ancient usage. The work known as the *Consolato del Mare*, or *Costumbres Maritimas*, compiled in the earlier half of the fourteenth century, treats it as a matter of course; and that work contains the earliest collection of the general customs and practices of European States in their



maritime relations. The correctness of the usage stood unchallenged until the end of the eighteenth century; and the occasional assaults upon it since then, so far as they are professedly based upon ethical principle, are based upon untenable theories, for which Rousseau appears to be ultimately responsible, that between belligerent nations, the private persons of whom those nations are composed are enemies only by accident; that they are not so as men, or even as citizens, but only as soldiers; that a State can have only other States for enemies, and not men, because no true relations can be established between things of different natures.

The unsoundness of such doctrines has been ably exposed by Hall and by Westlake, in their well-known writings upon International law.<sup>1</sup> I shall quote briefly from the latter writer.

“If no true relations can be established between States and men, it must be impossible for men not only to be enemies but also to be the citizens or members of a State, and, if it is only as soldiers that men are enemies, even accidentally, every measure employed in war with reference to the civil population, including the most moderate requisitions, contributions, and interferences with their liberty, must be unlawful. That legal situation would make war almost impossible. . . . War establishes between each of the States which are party to it, and the subjects of the enemy State, a relation which entitles the former to treat them as identified with their State; in other words, as enemies, so far as the necessities of war require under the limitations which are recognised as being imposed by humanity. This measure is different for combatants and for the peaceable population, as the necessities and limitations referred to are different for them; but the difference does

<sup>1</sup> Hall, *International Law*, 5th edition, pp. 65—67; Westlake, *International Law*, 1894, pp. 259—264.

not arise from any absence in the one case of a relation existing in the other. The men who form a State are not allowed to disclaim their part of the offences alleged against it, . . . or, therefore, to claim that hostile action shall not be directed against their State through them in their respective measures. And this is just. Whatever is done or omitted by a State, is done or omitted by the men who are grouped in it; or, at least, the deed or omission is sanctioned by them. That must be so, because a State is not a self-acting machine."

"Whilst the power of creating corporations with limited liability may well be granted to individuals by States which can impose the conditions and exercise the control necessary to prevent injustice, ethical principle must condemn the claim that men acting in groups, not subject to regulation by a superior, can repudiate their personal responsibility and leave outsiders to seek their only satisfaction from the means with which they have chosen to clothe the group."

To separate the State from the individuals who compose it is, as Hall observes, to reduce it to an intangible abstraction. The true position appears to me to be well put in Arts. 20 and 21 of the American Instructions for the Government of Armies in the field:—

"Public war is a state of armed hostility between sovereign States or governments. It is a law and requisite of civilised existence that men live in political continuous societies, forming organised units, called States and nations, whose constituents bear, enjoy, suffer, advance and retrograde together, in peace and in war. The citizen or native of a hostile country is, then, an enemy, as one of the constituents of the hostile State or nation, and, as such, is subjected to the hardships of the war."

It is not, however, to be concluded from the antiquity of a usage or from its defensibility in point of ethical principle,

that its abolition, absolutely or conditionally, may not at some time become both proper and practicable. Unless the influence of Christianity and the progress of civilisation are now but empty phrases, the recognition of the claims of humanity upon the conduct of belligerents ought to continue to deepen and widen. There was once a time when, even amongst the most civilised peoples, the course of the successful invader was commonly marked by the devastation of the land, the destruction or confiscation of private property, and the enslavement of women and children. In the centuries which followed the downfall of the Roman Empire, the influence of a Christianised civilisation began gradually to soften the asperity of warfare. The Church wielded a restraining and regulative, and generally, a pacific force: questions of international morality drew the attention of her doctors. The spirit of mediæval chivalry contributed to the elevation of a standard of honour in the conduct of war, to respect for the persons and the property of defenceless non-combatants, and to a gentler and more generous treatment of the foe who failed. In the sixteenth century came the Reformation; and the Reformation "brought with it a new fury of fighting, and the wars of religion were among the most ferocious that mankind had waged."<sup>1</sup> But the same century, towards its latter end, made compensation to humanity. It gave birth to the founder of the science of International law. To assert and to popularise, as Grotius and the great publicists since his time have done, the idea of an unwritten code regulating the reciprocal relations of independent States; illustrated and evidenced, indeed, by the conventions and the usages of nations, but resting upon ethical principle as its base, was a signal service in the cause of humanity. During the two-and-a-half centuries which have passed since Grotius taught, both statesmen and jurists, while professing to conform to Inter-

<sup>1</sup> Maine, *International Law*, p. 123.

national law, have, it is true, not infrequently disagreed amongst themselves as to what the rule of International law was, or as to the applicability of an acknowledged rule to a given case. In the heat of war acts have been done which no principle or precedent could be found to justify. Learned expounders of International law have sometimes failed to discern between the law as it is, and the law as in their opinion it should be, or have laid themselves fairly open to the imputation of political partisanship. Nevertheless, in the course of this same period, not only has International law been systematised, and its sphere enlarged, but, although sanctionless and devoid of legislative or judicial authority, it has acquired a great and a growing influence upon the conduct of the world. There stands behind it the formidable force of public opinion, which, in these days of swift and easy intercommunication, can manifest itself with promptitude and effectiveness. "An offender against the obligations of International law is seriously weakened by the disapprobation he incurs."<sup>1</sup> In order to confer upon amendments of International law the strongest moral cogency, attempts, beginning with the Declaration of Paris, have been made to substitute the solemn declaration of an international congress for the inferences to be drawn from the opinion of jurists, the evidence of usage, and treaties concluded between individual States. The subject of this paper is the consideration of the proposal, as it is in substance, to amend the Declaration of Paris, by moulding it so as to include within its terms the exemption from capture (subject to the law as to contraband of war and blockade-running) of all private property at sea, and by thus procuring the assent of the United States, the one dissentient in 1856, to obtain for the Declaration, in its amended form, a place in the Code of International Law.

<sup>1</sup> Maine, *International Law*, p. 221.

I do not intend—indeed, I do not think it would be becoming—to express a judgment as to the decision to which a council of the family of nations ought to come. My main purpose is to submit to this conference some suggestions and criticisms as to the reasons, *pro.* and *con.*, which have been put forward either on the humanitarian or the practical side of the enquiry. But before doing so, I think it may not be uninteresting if I record briefly the history of the movement in favour of this proposal to change the existing law.

So far as I am aware, the first publicist who advocated the proposed change was the Abbé de Mably, who was a diplomatist and statesman as well as an authority on International law. I have not had an opportunity of consulting his published work, *Le droit public de l'Europe fondé sur les Traités, depuis la paix de Westphalie jusqu'à nos jours*,<sup>1</sup> written about the middle of the eighteenth century. But I have had access to a trustworthy analysis of that portion of it which deals with the matter in hand. The argument of the learned Abbé in favour of the proposed change is based, in some degree, upon humanitarian grounds, but mainly upon considerations of advantage to the great commercial nations and especially to England. The real originator, however, of the movement in favour of the change was Benjamin Franklin, twenty-five years later. The eyes of the civilised world were then drawn to the young nation of the western hemisphere, which was just opening the first page of its great destiny; and all that its founders said and did in matters of International interest naturally received peculiar attention. A treaty of peace between the United States and Great Britain was being negotiated. In letters to Mr. Oswald, one of the British plenipotentiaries, in 1783, and to Mr. Benjamin Vaughan in 1785, Franklin urged the policy of an agreement that, in case of future war, unarmed merchant

<sup>1</sup> First edition, 1748.

ships on both sides should pursue their voyage unmolested. At his instance, in 1784, an article was submitted to the British Commissioners embodying Franklin's views, and providing also that neither nation should issue letters of marque. Great Britain dissented. But in 1785 (the year of the death of the Abbé Mably), Franklin, Jefferson, and Adams, representing the United States, successfully negotiated a treaty, containing similar terms, with the King of Prussia, which subsisted for a few years. The official American view, thus first promulgated, has remained constant. Successive administrations since Franklin's time have given it expression in messages to Congress and in instructions to their representatives abroad, and in communications made to foreign governments. In 1856 America, through Mr. Secretary Marcy, offered to adhere to the Declaration of Paris if the signatories would include in the Declaration the immunity of enemy's private property at sea. At the Hague Conference in 1899, the American commissioners, under the presidency of Mr. White, presented the following proposition :—

“The private property of all citizens or subjects of the signatory Powers, with the exception of contraband of war, shall be exempt from capture or seizure on the high seas or elsewhere by the armed vessels or military forces of the said signatory Powers. But nothing herein contained shall extend exemption from seizure to vessels and their cargoes which may attempt to enter a port blockaded by the naval forces of any of the said Powers.”

For reasons which it would be irrelevant to narrate here, there was no discussion or vote upon this proposition, but the Conference (the delegates of Great Britain and France not voting) passed a resolution that the whole subject should be included in the programme of a future Conference. Italy, in recent years, has shown a disposition to accede to the American view. The Marine Code of 1865 declared that

the capture of mercantile vessels of a hostile nation 'was abolished in the case of any State which should adopt reciprocity of treatment. In 1871, Italy concluded with the United States a treaty of commerce containing the exemption, subject to the condition of reciprocity. At the Hague Conference of 1899, the Italian Government, through Count Nigra, formally expressed its general support of the principle of the inviolability of private property on the high seas in time of war. No other State, so far as I can discover, has indicated, by official pronouncement, any definite decision upon the merits of the question. In 1866, when Prussia, Austria and Italy were engaged in war, the principle of the immunity of enemy merchant ships was adopted. In the Franco-Prussian war of 1870 the existing law was acted upon, Prussia being willing, and France unwilling, to grant the immunity.

The action of the American and Italian Governments is itself a clear indication that a great deal of support for the proposed change of law exists in the communities for which they speak, and there can be no doubt that a considerable body of favourable opinion has grown up elsewhere. In the eighteenth century the concurrence of the Neapolitan Abbé Galiani (writing "by command") added nothing to the weight of the opinion of the Abbé de Mably, which I have already cited. For us lawyers of to-day, the adhesion of jurists, such as Sir Henry Maine and Hall amongst my own countrymen, and Calvo, De Laveleye, and Bluntschli (to mention only a few amongst eminent foreign supporters of the change) abroad, is sufficient warrant for a serious consideration of the question. At meetings of the Institute of International Law, held at the Hague in 1875, and at Turin in 1882, resolutions in favour of the change were carried. Papers on the subject were read at the Buffalo Conference of this Association in 1899, and at the Chicago Congress of Lawyers and Jurists in 1905. But, without doubt, most

important factors in the development of a public feeling against the law as it stands have been the prodigious growth of maritime commerce during the last half-century and its complex ramification throughout the world. Commerce has become an elaborate and highly sensitive organization. The dislocation or suspension of any important branch of its trade will result in consequences which will be felt over half the globe. In regard to a commodity valuable for food, or as raw material for manufacture, the capture or destruction by a belligerent of a few cargoes, or even the risk of it, may affect the price of that commodity in every market. It is not only the enemy buyer, or the enemy seller, or the enemy carrier who is injured. The commerce of the world, as a business man has well said, is "dependent upon the efficient operation of a vast and complicated mechanism of exchange, which now, through the telegraph, brings constantly under its silent but effective guidance the whole industrial world." To propose to destroy commerce is to propose to inflict an injury which cannot be confined to those on whom it first falls. Even the immediate and direct loss to the enemy owner of the ship or cargo captured in many cases is made good to him at the expense of a neutral through the contract of insurance effected with underwriters in a neutral State. The indirect injury, in a war between two great maritime Powers, will certainly extend to many neutrals.

And so, in more countries than one, for some time past, there has been growing up amongst business men a considerable feeling in favour of the proposed change. Nearly fifty years ago Chambers of Commerce at Manchester, at Bremen, at Marseilles, and, I believe, at Hamburg also, declared the law as to capture of enemy's private property at sea ought to be altered. In 1871 an International Maritime Congress at Naples came to a similar conclusion. And I have the authority of Perels for the statement that a resolution



to the like effect was passed in April, 1868, at a session of the Reichstag of the North German Confederation.<sup>1</sup>

Of course, in weighing opinions expressed by governments, or by jurists, or by commercial men, for or against the proposed change in International law, those with whom the decision will rest will not fail to bear in mind that this is a question upon which even an entirely honest thinker must find it hard to be really impartial. Patriotism is a source of natural bias, against which it is difficult for either statesman or jurist to guard, and from which, indeed, it is not desirable that we should be entirely free. The judgment of those who devote themselves to commerce, may, unconsciously, be influenced by special considerations, which are deserving careful attention, but which must not be confounded with zeal in the cause of humanity.

I propose, with your leave, to see, in the first place, how the matter stands in regard to this last-named matter of humanity, which is much insisted upon as affording strong reason for the proposed change.

The right of war is, I suppose, as Vattel and Tetens and Azuni have said, the law of necessity, to which everything yields, and which is founded on the irresistible propensity of men to provide for their self-preservation. It is the law which commands the belligerent to deprive his enemy of every means of becoming stronger or more capable of attack, to weaken him by every possible mode, to prevent the augmentation of his forces and the prolongation of war, and to compel him to sue for peace. This involves the doing of acts which, viewed abstractly and apart from all other

<sup>1</sup> *Manuel de Droit Maritime International*, traduit de l'Allemand par L. Arendt, Paris, 1884.

Anyone who wishes to appreciate mercantile views upon this question, which I have briefly indicated, would do well to read two treatises, composed by a very competent English exponent of these views, Mr. J. T. Danson. They are entitled respectively *Our Commerce in War* and *Our next War*, and were published in London in 1894 and 1897.

relations, are acts of evil-doing. But, as necessity is the justification for war itself, so the acts done in the conduct of war must be at least reasonably necessary for the attainment of the objects of war. The loss and suffering caused must not be disproportionately great as compared with the resulting advantage. "The general principle is that in the mode of carrying on war no greater harm shall be done to the enemy than necessity requires for the purpose of bringing him to terms. This principle excludes gratuitous barbarities, and every description of cruelty and insult that serves only to exasperate the sufferings or to increase the hatred of the enemy without weakening his strength or tending to secure his submission."<sup>1</sup> The necessity, according to Tetens, may be judged of by the criterion, that the means employed to produce the effect be in proportion to the end for which they are employed. To obtain the object to be effectuated, we must not do more mischief than what is unavoidable in order to obtain it. This is a universal rule, applicable not only to the plan of operations against the enemy, but also to each single operation.<sup>2</sup> Whilst, however, in principle, necessity in war is omnipotent, and war is essentially inhuman, there is a degree of inhumanity in certain acts which is so intolerable that the usage of civilised nations, now crystallised, and imbedded in International law by the Hague Convention of 1899, has placed them as acts of land warfare in a catalogue of absolute prohibition. Other acts of land warfare, in the interest also of humanity, are, by the same convention, regulated and limited by conditions; and a third class of acts is held to be justified only if demanded imperatively by the necessities of war. In the first category are included (*inter alia*) the use of poison or poisoned arms, the massacre of prisoners, treacherous assassination, the attack or bombardment of towns, villages,

<sup>1</sup> Maine, *International Law*, p. 138.

<sup>2</sup> See Reddie, *Maritime International Law*, Vol. II, p. 143.

and habitations which are not defended, and pillage; in the second class are requisitions and demand of services, and the use of the enemy's railway plant, land telegraphs, telephones, &c., and all kinds of war material, even though those things are private property; in the third, the seizure or destruction of enemy's property. Now we are considering maritime warfare. How ought that to be conducted? No one, so far as I have heard or read, suggests that the capture of the enemy's merchant ships and their cargoes should be absolutely prohibited. We cannot suppose that any maritime State will allow vessels available as transports to assemble unmolested for the invasion of her shores or to cruise unmolested as spies. No one has proposed that enemy's vessels should enjoy immunity if carrying contraband of war or running a blockade. The question put is this: Is it reasonable that the right of capture should be generally forbidden, and held justified only upon proof of some special necessity?

I am not, as I have already said, presuming in this paper to offer a judgment of my own on the case. I am simply desirous of drawing attention to those points which appear to deserve consideration.

Let us look first at the case as it is put forward on the humanitarian side. There is no doubt that the capture or destruction of enemy's merchant ships and enemy's cargo laden thereon, like most other active operations of warfare, involves personal suffering and loss to some non-combatants. The crew of the captured vessel become prisoners of war for the time, and the existence of the system of capture by causing a total or partial suspension of sea traffic takes away the means of livelihood from a large number of those who pursue avocations directly or indirectly dependent upon the continuance of the carriage of goods by sea. Nor is this hardship entirely confined to the subjects of one, or, if the

belligerents are fairly matched in sea power, of both of the warring States. Similar classes of workmen in the neutral ports to which in time of peace the shipments from the belligerent nations used to go will be injuriously affected, although, to some extent, their loss may be mitigated by the continuance in neutral bottoms of the trade formerly carried on by ships of the belligerents. In the second place, there is also, of course, a loss to the wealthier classes of both the belligerent countries, who own the ships and the goods which are captured. There is the direct loss for which they may and generally would be indemnified by the underwriters. There is also the indirect loss, owing to a general interference with business, and also to the rise of freights and of insurance premiums which might, possibly, in time, result in a permanent transfer both of the carrying trade and of branches of mercantile business to neutral competitors. And, further, as I have pointed out in an earlier part of this paper, the sea-borne trade of one or both of two great commercial countries could not, in these days, be crippled or suspended by the operations of war without serious injury resulting to neutrals also in many parts of the world. All this mischief to mercantile interests (whether as affecting the belligerents or neutrals) is obviously a very important matter in itself. But I am by no means sure that it can, in strictness, be treated as a point in the humanitarian case. Something may be held to depend upon its ultimate incidence, and this is a question for the political economist on whose realm I do not venture to intrude.

There is yet another argument to be mentioned, and it is one which is properly an argument of humanity. It is urged by some of those who favour the proposed change that the existing rule gives encouragement to attacks upon defenceless merchant vessels in order to obtain prize money,

and thus tends to keep alive an ancient and discreditable notion that war may be waged by honourable men for their own private gain. But, in my humble judgment, the plea has, in these days, lost all practical weight. The danger referred to vanished (for America, since the war with Spain, may be treated as assenting to the Declaration of Paris) with privateering in 1856. If I rightly appreciate naval opinion, patriotic prudence, if nothing else, would now prevent the naval officers of a great Power from entertaining any temptations to chase merchant ships merely for the sake of private lucre. Such a proceeding, to use the words of a high authority,<sup>1</sup> is one "in which effect is frittered away in the feeble dissemination of the *guerre de course*, instead of being concentrated on a great combination to control the sea."

After reading and considering a great deal that has been spoken and written upon this subject of capture of enemy's private property at sea, I cannot help thinking that the force of the very considerable agitation, which has gradually grown up in favour of alteration, is largely, if not mostly, due to a moral sentiment—a feeling that to maintain a right, in general, to capture, and, if the circumstances, from the naval point of view, require, to destroy private property at sea, is to fall short of the moral standard of modern civilisation in the conduct of warfare. Such a feeling is one of a noble sort. Emotional energy has helped in the past, and will help in the future, to do a great deal for the happiness of mankind. But to be truly useful, and not to do harm, it ought always to be guided by an accurate knowledge of facts, and by a just appreciation of the relation of facts to each other. I venture to suggest that, so far as the appeal for change is based upon a comparison of the treatment of private property in war on land and the treatment of private property in war upon the seas;

<sup>1</sup> Mahan, *The Interest of America as a Sea Power*, p. 133.

the language and the reasoning, in not a few cases, of those who have made the appeal, are open to serious criticism. Private property is said to be respected in land warfare; and then it is asked, sometimes almost indignantly, and with much flourish of rhetoric, Why is private property not respected in maritime warfare? The capture of private property at sea has been denounced as if it was identical in character with the military pillage which is not one of the ways of modern warfare, and which is absolutely prohibited by the express terms of the Hague Convention.

Now, there are three points as to which I wish to invite your attention in questioning the strength of this line of advocacy.

I.—First, there underlies the whole position an assumption that the degree of necessity which exists in maritime warfare for the capture of private property of the enemy is no greater than, or different from, the degree of necessity for the capture of private property in land warfare, it being granted, of course, that, in both cases alike, the test of justification of the conduct of war (not being the perpetration of any of the absolutely prohibited acts) is its reasonable necessity in order to achieve the end of war, that is to say, success.

Is this assumption sound? Are not the conditions of the two cases so different as to prevent there being any real analogy between the two operations? May it not be said with force that the private property on land which is exempt is private property the taking of which, in general, and excluding the special classes of private property which are within Art. 53 of the Hague Convention, could not reasonably be expected to affect the issue of war; whereas, at sea, the ships and the merchandise in transit on board of them, although privately owned, may not infrequently form no small portion of the national resources upon which the enemy must rely in order to persist in his resistance? I.

shall not offer an answer to these questions. But I may add in regard to enemy's ships, these questions do not lose in importance by reason of the fact that a daily increasing proportion of the vessels which are now used in commerce consists of large and swift steamers, readily available as transports and for the rapid acquisition and transmission of information of the enemy's movements and operations, or convertible into armed cruisers; whilst their crews in the engine-room and stoke-hole constitute valuable, because trained, recruits for the *personnel* of the modern warship. Russia, as far back as 1878, founded a "Volunteer" fleet, and Great Britain in 1887, and America in 1892, entered into special arrangements with certain steamship companies for the right of employment of steamers of these companies in Government service.

II.—The second point in the appeal to which I desire to call attention is the fundamental statement that private property is respected in land warfare. Does not this allegation make far too much of the rule and far too little of the actual practice? Not fifty years ago a great general marched through Georgia and Carolina, devastating the hostile country as he went for reasons of military necessity. Would any commander in the field, in the enemy's country, hesitate—ought he, indeed, to hesitate—to demolish chateau or cottage or factory, or to cut down private woods or standing crops, if he judged it to be strategically necessary to do so in order to secure his own position in battle, or to weaken his opponent's? *Kriegsraison geht vor Kriegsrecht*. In the course of the same American War as that in which General Sherman made his celebrated march, the Federal troops seized, wherever they could find it, the privately-owned cotton, which constituted an important part of the resources of the Confederates. And in regard to such seizure, the Supreme Court of the United States has decided that it was lawful.<sup>1</sup>

<sup>1</sup> See, as to this *Wheaton*, 4th English ed., p. 483.

III.—The third and last point is the comparison of capture of enemy's property at sea to the pillage which the Hague Convention has absolutely prohibited. I am, I confess, wholly at a loss to understand such a comparison. What pillage was in olden times we all know well—the licensed indiscriminate plunder of terrified and helpless families by an excited soldiery. What possible resemblance is there to this in the orderly and formal capture of a merchant ship by a man-of-war, and the orderly and formal condemnation of that ship and its cargo, if it be lawful prize, by a Court of Justice? The distinguished lawyer and statesman who at present holds the highest legal office in my country, but who was then Sir Robert Reid, wrote, in October last, a weighty letter to the *Times*, suggesting the favourable consideration of the proposed change, in the interest of Great Britain. But, in the course of that letter he remarked, and, as I respectfully maintain, with absolute truth, "No operation of war inflicts less suffering than the capture of unarmed vessels at sea."

I shall not, I hope, be deemed prolix if I add upon this point two quotations, one from an English and one from an American authority. Mr. Lawrence, who has held the post of Professor of International Law both in an English and in an American University, has put the case, as it seems to me, with great clearness<sup>1</sup>:—

"In fact, the superior humanity of land warfare exists more in name than in reality. Private property may still be captured at sea; on land it is exempt from seizure. There is a sharp contrast in the rules so far as words are concerned. But, if we leave expressions and deal with facts, we shall find that a country may be swept bare of supplies to feed the soldiers who hold it down by hostile force. Peasants may be impressed to drive their own carts for the invaders. The produce of the farmer, the stock of the trader, the stores

<sup>1</sup> *The Principles of International Law*, pp. 362, 363.



of the merchant, may go to fill the magazines of the enemy; and the slightest attempt on the part of the population to aid their fatherland by active means may expose them to all the horrors of military execution. It is true that the individual soldier is not allowed to plunder at his pleasure, but neither is the individual sailor. The capture of a merchantman is as regular and orderly a proceeding as the levy of a requisition upon a country town. In both cases private property is taken, but taken by disciplined agents of the enemy State acting under public authority. If there be any moral superiority, it is on the side of the maritime transaction; for a boat's crew engaged in the search and capture of a trading vessel can be kept under more complete supervision than a foraging party engaged in taking grain and stock from a country village; and, moreover, the presence of women and children in the one case, and their absence in the other, suggest considerations which certainly do not favour the claim of superior humanity made on behalf of land warfare."

Hall makes a similar statement,<sup>1</sup> and at its close quotes this language from Dana:—"Maritime capture takes no lives, sheds no blood, imperils no households, and deals only with the persons and property voluntarily embarked in the chances of war for the purposes of gain and with the protection of insurance."

I desire, before quitting the region of humanitarian argument, to call attention to the fact that there are those who oppose the immunity of private property on the very ground of humanity itself. What, they ask, is the ultimate object for which good and humane men should work? Surely, the cause of peace. Is it quite certain that, in respect of the interests of peace, war at sea may not be made too cheap, that the amount and area of economical loss by war may be too narrowly limited and so a powerful influence in restraint

<sup>1</sup> *International Law*, pp. 446, 447.

of war may be destroyed or seriously impaired? If you render maritime trade immune, you remove one of the worst terrors of war from the wealthier classes, the classes which, in some countries at any rate, are the chief directors of the national policy. Will a Power be less likely to go to war if it no longer has either to defend its maritime commerce or to transfer it to a neutral flag? Sir Thomas Barclay adverted to this point in a paper read by him at the Buffalo Conference of this Association in 1899; it was the principal topic of an eloquent speech of Mr. Moorfield Story, of Massachusetts, a delegate of the United States Government, when addressing the St. Louis Congress of Lawyers and Jurists in 1905, upon a resolution which had been proposed in favour of the exemption from capture of private property at sea.

I quote his concluding words: "I want to oppose war by everything that can be done. I do not want the citizens of a great country to feel that they can go out among the farmers of the country and say 'give us your sons, but our pockets are to be exempt from contribution.' If we are to have war, let it fall on the material resources of the country. You cannot bring people to peace as quickly by killing as you can by destroying their resources, and for that reason I am not inclined to pass this resolution. It tends to reduce war to a gladiatorial show, like a football game, instead of making every man in the nation feel the effect of it."

Sir Henry Maine appreciates the argument, though, upon the whole, he does not deem it convincing. Writing upon the Declaration of Paris, he says:<sup>1</sup> "It may be asked whether it would tend to diminish wars if economical loss were reduced to the lowest point, and if hostility between nations resolved itself into a battle of armed champions, of ironclads and trained armies, if war were to be something

<sup>1</sup> *International Law*, p. 123.

like the contest between the Italian States in the Middle Ages, conducted by free companies in the pay of this or that community. I think that even thus modified, war would be greatly abated. But this is a subject which ought not to be taken for granted without discussion."

When we pass from the consideration of the present question on the humanitarian side, and approach its practical side, we enter a region in which the only trustworthy guides are the statesman and the naval expert. The opinion of a layman, like myself, would be worth nothing, and, even if I were bold enough to form a judgment, I should not deem such an occasion as this a fitting one for its delivery. The matter is one which would necessarily involve the consideration of the interests of particular nations: and that, as I stated at the outset, it is my set purpose to avoid. This much, however, I may say. The determination of those who will have, in a representative capacity, to discuss the question must depend in large measure upon the counsel which, in the interest of their respective countries, competent advisers may give, first, as to the value, in the present and in the future, of commerce-destroying for success in war, as to which there is evidently a wide difference of opinion (Mahan, for example, affirming that "blows against commerce are the most deadly that can be struck,"<sup>1</sup> and others maintaining an exactly opposite opinion);<sup>2</sup> and, secondly, as to the comparative advantage, on the other hand, which may result, under a change of practice, from the security, during a war, of the continuance of a sea-borne supply of food and of the various materials upon which manufacturing industry is dependent.

<sup>1</sup> *The Interest of America as a Sea Power*, p. 133.

<sup>2</sup> See Lawrence, *Principles of Maritime International Law*, pp. 415, 416.

In November, 1856, Lord Palmerston, in an address to the Liverpool Chamber of Commerce, expressed the opinion, "If we look at the example of former periods, we shall not find that any powerful country was ever vanquished through the losses of individuals."

I shall now bring this paper, which has already extended to a greater length than I should have desired, to a close with a few suggestions.

The first of these is that with the consideration by the nations of this question of the immunity of enemy's property at sea from capture in war, should be linked the consideration of the subject of contraband of war. It has been truly said that, as long as it remains in its present chaotic condition, we must have constant bickering between belligerents and neutrals, and that if a great maritime war broke out powerful commercial States might find themselves drawn into hostilities almost against their will. The dangerous, and, to neutrals, very troublesome uncertainty that exists at present in regard to the treatment of articles which are *incipitis* (or, *promiscui*) *usus*, ought to be remedied. It can be satisfactorily remedied only by an international agreement, classifying contraband definitely and completely. An interesting illustration of the unsatisfactory nature of the position of the matter of contraband is afforded by the Parliamentary paper of February last, which contains the correspondence between the governments of England and Russia in reference to the Russo-Japanese war. The relevancy of the question of contraband to the subject of our enquiry is this. It appears to me that, if the arbitrary decision of any belligerent (as is at present the case) may include every important article of commerce, such as provisions, trade materials, fuel, &c., in the list of contraband, little can be gained by a general exemption of private property from capture at sea. It appears to me also, that it conceivably might make a great difference to the view which some nations would be willing to adopt in regard to the proposed change, if it were definitely settled law that some, at any rate, of the principal articles of sea-borne commerce, and, especially, food for human consumption and the raw materials required by peaceful industries, could

never lawfully be treated as contraband of war unless the captor could show that the particular cargo was destined for use for naval or military purposes of the enemy either in the region of actual operations or elsewhere.

And, further, with the question of the exemption of enemy's private property from capture at sea, should there not be considered the propriety of a definite pronouncement that the bombardment by naval forces of defenceless and unfortified towns and places on the sea coast, or the threat of such bombardment in order to secure the levy of contributions or compliance with requisitions should be forbidden? Some jurists, I believe, hold that by the tacit consent of nations, such conduct has already come into the category of forbidden operations. I cannot see sufficient justification for the view. In 1882 a distinguished French Admiral, writing on his own behalf, of course, and not officially, published the opinion that "armoured fleets in possession of the sea will turn the powers of attack and destruction against the coast towns of the enemy, irrespectively of whether these are fortified or not, or whether they are commercial or military, and lay them in ruins, or, at the very least, will hold them mercilessly to ransom"; and the writer was subsequently appointed Minister of Marine. Mahan evidently considers such a proceeding as not being prohibited by usage, for in the course of his argument in support of the existing system of capture of enemy merchant ships he says<sup>1</sup>—"Nor is there any among the proposed uses of a navy, *as, for instance, the bombardment of seaport towns*, which is not at once more cruel and less scientific." It is highly desirable the matter should be finally concluded by common agreement. The settlement of this question, as well as the classification of contraband, might do something, at any rate, to influence favourably some of the maritime powers in their consideration of the immunity of private property at sea, as a question of policy.

<sup>1</sup> *The Interest of America as a Sea Power*, p. 163.

Lastly, I venture to add that, although agreement as to a general immunity of private property of the enemy at sea may prove to be impossible, the collected representatives of the various members of the family of nations might be asked to consider whether some modification of the present system might not advantageously be adopted, in the form of a particular exemption in favour of the vessels of the great steamship lines which carry mails and passengers everywhere along established routes, and upon whose continued regularity of service the intercourse and intercommunication of large portions of the globe are absolutely dependent. Effective guarantees must, of course, be taken against abuse of such a peculiar freedom, but it ought not to be impossible to frame such guarantees. It cannot be doubted that the arrangement would confer a very great boon upon mankind. I have found in a note in the French translation<sup>1</sup> of the work of Perels a precedent, on a small scale, for such a course as I have ventured to suggest for universal international agreement, in the postal treaty, which Perels there cites, concluded between Great Britain and Denmark in June, 1846.

With these suggestions I conclude a paper, which has run to a far greater length than I had hoped and intended, but which, nevertheless, leaves much unsaid upon a great subject of practical importance. I have not written in order to express an opinion for or against the change; I have simply tried, clearly and fairly, to lay before the Conference the most important points, as they seem to me, to be considered before the proposed change can be accepted, with a brief statement of the history of the question and of the principles which, as I venture to think, must govern its solution.

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<sup>1</sup> Arendt's Translation, page 236.

### ‘III.—DISSENTING OPINIONS.

THE aim of all judicial systems should be the adjustment and maintenance of principles of law and procedure, and their proper application to the facts of given cases. The judiciary are the arbiters in the settlement of disputed questions of law, and it is through the judiciary that principles of inherent right and justice and equity are vindicated according to the new and fluctuating conditions of government and society; and it is this that has gained for the judiciary in all civilised countries public confidence and respect. Lawyers, it is well known, disagree. This is but natural, however, when one considers the personal motive and keen professional interest excited in behalf of one's client, for the lawyer is but the champion of the cause which he advocates. On the other hand a judge stands indifferent, raised aloof from the influence of party interest, as the arbiter of right and justice. His duty it is, irrespective of personal inclination or prejudice, or the shortcomings of any particular individual, to analyse principles of law in their primitive and fundamental aspect and apply those principles to the facts before him. It is the duty of judges to be so impartial as to be not only willing but ever ready to change an impression that may be erroneous; to be willing to be convinced that they may be wrong. It is the duty of judges to agree and not to disagree; it is their duty to be united and not disunited; it is their duty to be harmonious and not acrimonious; it is their duty to render judgments that the wisdom of the majority should make final and conclusive when the consensus of judicial authority outweighs their individual opinion. Judges should be independent, fearless and unbiassed, but they should not be obstinate. Tenacity of purpose and principle is one thing, but tenacity of will that blocks the wheels of justice and brings judicial learning and authority into contempt, is quite a different matter.

The tendency of dissenting opinions is to bring unrest and doubt not only in the minds of the legal profession but among the public. Certainty of the law is the life of the law, and where principles are so unsettled and disputed as to enable the highest Courts to be almost equally divided, the tendency is to lessen the dignity and authority of judicial decision. Any system is wrong which permits the rendering of dissenting opinions and printing them in public reports of cases—in permitting anything more than the rendering of the judgment of the Court as a Court. What the individual judges think, the arguments they urge among themselves in their private chamber in discussing a case matters little to the legal profession, and certainly less to the public. What the public demands, and what the legal profession asks for is a united judgment either for or against the appellant: what they demand is the full weight and authority of a united Court; and where the minority are over-ruled by the majority, the minority should be suppressed and not permitted to vent their discontent in juridic analysis. The frequently delightful but yet purely academic discussion of the minority is like the wailing of a dog whose tail is caught in a trap—you hear it, *but the dog is caught all the same*. What possible good can result from a dissenting opinion? It certainly cannot control the majority, nor can it in any way affect the law as determined by them. It simply litters up pages of law reports with divergent views, the dissenting judge frequently posing as the champion of a lost cause. The better rule would seem to be to follow the course adopted by some Courts and to make it imperative that the opinion delivered shall be the judgment of the Court. The names of the individual judges who concur or dissent should be obliterated from the reports. What the legal profession wants are the judgments of its Courts as a united body and not the individual opinions of judges. When a Court decides an important question, its judgment should have the full



weight, respect, dignity and authority, which a Court composed of able and distinguished judges is entitled to. As it is, it too frequently happens that judgments of Courts of final resort are but the judgments of one judge, for the Court is so evenly divided that the vote of one judge sways its final determination either to the right or to the left. This difference and confusion of judicial opinion among judges, especially in Courts of final resort, is pernicious in its result ; it tends to the decline of judicial authority, and weakens the confidence which the public should be encouraged to have in its highest Courts.

While there are in the different States of the Federal Union, Courts of Appeal, Supreme Courts and Courts of Errors, which are commonly supposed to be Courts of last resort, yet throughout the somewhat intricate judicial system of the forty-seven States and of the Federal Courts there is but one Court of last and final resort, that is to say, the Supreme Court of the United States. Under the Federal Constitution the judicial power of the United States is vested in one Supreme Court, and in such inferior Courts as the Congress may ordain and establish. It is evident, therefore, that what was in the minds of the framers of the Constitution was a Court as a concrete whole rather than a disintegrated number of judges. The judicial power of such a Court, pronouncing its judgment as such, would be unquestioned, whereas the purely academic opinions of a confused and dissenting number of judges leaves the matter in dispute still disputable. From the judgment of that Court there is no appeal. Its judgments comprise all that the rank, dignity and power of the word Supreme includes, for it is the one Court in the United States that is in fact and in law supreme over all others. The Supreme Court of the United States is what the House of Lords is in England and what the Cour de Cassation is in France, and it is but natural, therefore, that great weight and deference should be given to its judgments and final determinations. .

Unfortunately, the public records of the judgments of some of the highest Courts in the United States do not carry out these ideas. American law reports are strewn throughout with dissenting opinions, and dissenting opinions have become so frequent that in almost any important case one is surprised not to find them; and, in fact, dissenting opinions are frequently much longer and more elaborate than the prevailing judgment of the Court, and even more logical and convincing.

If one, for example, will examine the three last volumes of the New York Court of Appeals Reports, a forcible illustration of this prejudicial practice of dissenting opinions will be found.

In the 180th New York Reports sixty-eight cases are reported, in which opinions were written, and in nineteen of these cases there were dissenting opinions; in other words, in nineteen cases out of sixty-eight the judges of the Court were divided, and in most of these cases the minority spread upon the record the grounds for their disagreement. In ten of these cases the Court stood three to four, so that the judgment practically became the judgment of a single judge. In the 181st New York Reports opinions were delivered in fifty-six cases, and in sixteen of them there were dissenting opinions; in eight of which the Court stood three to four: and in the 182nd New York Reports forty-seven cases are reported, in thirteen of which the judges dissented.

Nothing is gained by such wide-spread divergence of judicial opinion, for it only tends to bring judicial authority into contempt. In the Courts of Appeals of New York, as in other high Courts, one cannot help remarking that certain judges differ from their brethren more frequently than others. One might expect to find a more flattering union of judicial thought in the Supreme Court of the United States, but unfortunately this is not so. The same

objectionable custom prevails there, spreading on the records of reported cases the dissenting opinions of the minority. While, as we have already said, this is in law and in fact the final Court of resort in the United States, yet it is unsatisfactory to observe how often the judgments of this great tribunal, instead of being the united, harmonious and conclusive opinions of that august body, are but the conclusion of a majority of its judges, who by their numbers out-vote their associates, leaving, however, to them the opportunity of publishing and recording in the public records and in the public reports their individual views of not what the law is, but what it ought to be. The Supreme Court of the United States should be Supreme in fact and in law; it should be so far Supreme and above all other Courts in our land as at least to have its judgments recorded as the judgments of the Court itself—as the final conclusion of a body of men, than whom, in learning and legal ability, none better exist.

In the 25th Supreme Court Reporter (decisions of the Supreme Court of the United States) we find that opinions were written in the Supreme Court of the United States in 187 cases, and that in forty-three of them the Court was divided, in most of which stringent dissenting opinions have been written. In fact we find that, in the very first case reported in that volume, Justice Harlan dissented, and in the second case reported Justice White dissented. An analysis of the dissenting opinions in this single volume shows that Justice Harlan dissented in twenty-one cases, Justice Peckham in sixteen, Justice Brewer in thirteen, Justice Fuller in nine, Justices White and Day in seven, Justice Brown in six, Justice McKenna in five, and Justice Holmes in four. In the 197th Supreme Court Reports 45 decisions are given, in 13 of which dissenting opinions were written, Justice Harlan dissenting six times, Justices Peckham and White four times, Justice McKenna three times,

Chief Justice Fuller twice, and Justices Day and Holmes once.

In the 198th Supreme Court Reports we find that 48 decisions are published, in 16 of which the Court was divided, Mr. Justice Harlan again heading the list of dissenters, he having dissented in seven cases.

It may be interesting to point out that judges differ in some of the United States more frequently than in others, and in some Courts there seems to be much greater discontent than in others. An examination of the final decisions of the highest Court of Resort of the different States of the United States gives the following result:—

In the 52nd South-eastern Reporter, 467 cases are reported in which there were 15 dissenting opinions; in the 91st South-western Reporter 557 cases were decided with eight dissenting opinions; in the 83rd Pacific Reporter 501 cases are reported in which the judges differed 26 times; in the 39th Southern Reporter 676 cases were reported with 13 dissents; in the 62nd Atlantic Reporter 606 cases were decided with 11 dissenting opinions; and in the 106th North-western Reporter 629 cases are reported with seven dissenting opinions.<sup>1</sup>

The above average compares most favourably with the Appellate Division of the Supreme Court of the State of New York. While this Court is for many purposes an intermediate Court of Appeal, yet in many cases it is a tribunal of final resort, and therefore it is desirable that its decisions should be unanimous. It may be argued that in Courts of intermediate appeal it is unobjectionable to have divergent views and differences of opinion of the individual members of the Court, and that these serve a valuable purpose in enabling the Court of final resort in the event of an appeal in deciding the case; but in a Court in which over half the cases determined by it are final, such

<sup>1</sup> See Table of Cases, p. 64.

dissenting views are to say the least regrettable. Taking for example the 97th New York Supplement it will be found that 450 cases are reported as having been decided by the Appellate Division of the Supreme Court, in 70 of which the Court was divided and dissenting opinions were written. Certainly such a large per-centage of divergent views in a Court of such dignity can serve no good purpose.

On the other hand, in England, there seems to be a much greater unity of judicial opinion. Judges, pending the argument of appeals, may frequently make enquiries and interject views that on the final consideration of the case they abandon; but the judges appear to seek with greater tenacity of purpose harmonious and united results. When one does encounter a dissenting opinion it is usually not so drastic as those made in the American Courts, and the rarity with which dissenting opinions are found in England is one of the reassuring features of the greatness, stability, and learning of the English judiciary.

In the Law Reports, Appeal Cases for 1904, opinions were written in 157 cases, and in these there are only three cases in which any dissenting opinions were rendered. The principal case in which the Court was divided was the great case relating to the Scotch Church, a case which might very naturally involve a great deal of personal feeling and divergence of views, but in this case only two judges dissented; while in *Winans v. Attorney-General* one judge, Lord Lindley, differed with the majority, and in the third case, *Hunter v. Rex*, Lord James alone dissented. In L. R. [1904], 2 K. B. 227 cases are reported with only five dissents. Imagine a Court composed of 100 judges with 51 voting one way and 49 the other. The result in such a case would be practically the same as though but one judge sat. If the propriety of the recording of judgments of almost equally divided Courts, or of Courts where the prevailing judgment is determined by the voice of one judge is admitted, we have

precisely the same condition of things as though the case had been argued before and determined by a single judge. The idea of a numerous body or of a Court constituted of a number of judges is for the purpose of obtaining greater weight of judicial learning and authority in the determination of important questions. A fair illustration of what the Courts should strive to attain may be found in our prevailing jury system. A jury composed of 12 men is frequently at first equally divided. The system of trial by jury, however, does not permit of a verdict either *pro* or *con* except upon the united voice of the jury as a composite body; it does not permit the recording of the vote of the majority, nor does it sanction the enrolling of the protest of the minority. It is the united voice—the weight of authority of the 12 jurors as a body, although composed of many individuals—that makes its verdict authoritative, final and convincing.

Why should not the judiciary follow this example? Why should they not, although frequently differing at first one from another, follow the laudatory example of a united jury and themselves be willing to be convinced by the arguments of the majority, so that their voice would be the voice of harmony and not of discord.

Such expressions as “I concur,” “we concur,” and “all concurred,” should be eliminated from reports of cases. All question as to whether all the judges concurred or not should be removed from public criticism; of course they should all concur, and if they do not then they should be made to do so in the same way that an obstinate juror is brought to reason. No individual member of a Court has any more right to insist on his own personal opinion against that of the majority than a member of a jury has to unreasonably protest against the judgment of his fellow jurymen. Judges should concur in the same manner that jurors have to concur, a habit some of them might cultivate to the

increased reputation of the Courts whose bench they adorn. Jurors are the arbitrators of all questions of fact, while judges determine all questions of law, each being supreme in their different functions. If Lord Coke discovered "abundance of mystery" in the patriarchal and apostolical number of twelve of which the ordinary jury is composed, how much greater would be his surprise were he living to-day to contemplate the "abundance of mystery" in the discordant and clashing judgments of the mystic nine, the number of judges composing the Supreme Court of the United States?

"It has been wisely ordered," says Judge Stephen, "that the principles and axioms of law, which are general propositions flowing from abstracted reason and not accommodated to times or to men, should be deposited in the breasts of judges, to be applied when occasion shall arise to such facts as come properly ascertained before them. For here partiality can have little scope: *the law is well known.*"

Unfortunately, this high ideal no longer exists as it should exist. The law has long since ceased to be well known: and this is due to a large extent to dissentient opinions. Until judges make up their minds to agree, and among themselves are willing to lay aside their own opinion when opposed to that of the majority of their brethren, the law will never be, in the words of Judge Stephen, "well known," nor will the judgments of Courts of final resort receive that respect, that veneration, to which they should be justly entitled.

No one can question the learning, the ability, and the indisputably untarnished character of the judiciary of the United States, but the custom of allowing dissenting opinions is, to say the least, unsatisfactory; it is pernicious in its result and tends to unsettle principles of law. Instead of quieting disputes and permanently defining the straight,

broad road of justice, they demonstrate the unstability of the law and how the "House of the just is divided unto itself." What humble layman can say he is right or wrong, when we daily behold the ablest jurists on the bench publicly disagreeing among themselves?

If we wish to avoid the decline of judicial authority we must avoid judicial dissension, judicial divergence of views, judicial discontent, judicial obstinacy; we must have a united Court and a united judgment. Judgments of the highest Courts should be their judgment pure and simple, in which all individuality of the members of the Court disappears and is absorbed in the united opinion of the Court pronounced by the judge who renders it. We might even draw a beneficent example from the highest Court in France, the Cour de Cassation, where the judges remain unknown to the public at large, and where in the judgments of the Court the name of the individual members thereof never figure. The Cour de Cassation is a Court of last resort, of final appeal, but it is the Court itself which renders its final judgment, and for which the French people have the highest regard and esteem; it is not the individual members of the Court who figure in its reported decisions. Such a Court has the weight of judicial authority. It is stamped with the dignity of a Court firmly built on the law of the land, and irrevocably established on principles of justice and equity, for unity is stability. Such should be the ambition of our Anglo-Saxon Courts of final resort. They should seek to establish their judicial power and dignity by becoming united, and the way to accomplish this is to do away once for all with dissenting opinions.

It is refreshing to turn to the principles relating to trial by jury as laid down by some distinguished text writers, and which make one almost wish that the same rules might be applied to Courts of final resort.

For instance, Stephen, in mentioning some curious old



customs, tells us that in addition to being kept together until unanimously agreed, if the jury eat or drink at all, or have any eatables about them without the consent of the Court and before verdict, they are finable. Not only this, but it is laid down in the books that if jurors do not agree in their verdict before judges are about to leave town, although they may not be threatened or imprisoned, the judges are not bound to wait for them, but may carry them round the circuit from town to town in a cart. How refreshing it would be, in case of our learned judges in Courts of final resort not agreeing on their final judgment, that they should not either have food or drink, but in addition should be coerced by being transported from town to town in a cart! Certainly such a spectacle, while it would not lend to the judicial dignity of the Court, might be a successful and speedy means of putting an end to dissenting opinions.

C. A. HERESCHOFF BARTLETT.

#### TABLE OF CASES REFERRED TO ON PAGE 59.

The following is in detail the cases and dissents above referred to:—

52 <i>S. E. Rep.</i> .	West Virginia	72 cases,	5 dissents.
	North Carolina	77 "	6 "
	Georgia	198 "	2 "
	Virginia	75 "	2 "
	South Carolina	45 "	no "
91 <i>S. W. Rep.</i> .	Missouri	155 cases,	5 dissents.
	Texas	229 "	2 "
	Kentucky	115 "	1 "
	Arkansas	61 "	no "
	Indian Territory	7 "	" "
83 <i>Pacific Rep.</i> .	California	121 cases,	3 dissents.
	Kansas	82 "	2 "
	Washington	30 "	2 "

\*83 *Pacific Rep.* (continued):—

Arizona	7	cases,	no	dissents.
Colorado	51	"	2	"
Idaho	42	"	1	"
Montana	26	"	11	"
Nevada	3	"	1	"
Oklahoma	31	"	no	"
Oregon	29	"	1	"
Utah	26	"	9	"
Washington	42	"	3	"
Wyoming	9	"	no	"

39 <i>Southern Rep.</i>	Louisiana	78	cases,	5	dissents.
	Alabama	365	"	4	"
	Mississippi	65	"	2	"
	Florida	168	"	2	"

62 <i>Atlantic Rep.</i>	Maine	34	cases,	no	dissents.
	Maryland	69	"	"	"
	Delaware	29	"	"	"
	Connecticut	32	"	"	"
	New Hampshire	36	"	2	"
	New Jersey	195	"	3	"
	Pennsylvania	152	"	4	"
	Rhode Island	20	"	1	"
	Vermont	39	"	1	"

105 <i>N. W. Rep.</i>	Iowa	149	cases,	1	dissent.
	Michigan	117	"	1	"
	Minnesota	68	"	1	"
	Nebraska	173	"	3	"
	Wisconsin	82	"	1	"
	South Dakota	16	"	no	"
	North "	24	"	no	"

76 <i>N. E. Rep.</i>	Massachusetts	117	cases,	1	dissent.
	Indiana	188	"	3	"
	Illinois	91	"	1	"
	Ohio	31	"	2	"

#### IV.—OUR JURY SYSTEM REFORMED.

THE reform of our present jury system might well be added, and perhaps will be, to the extensive list of reforms and legislative enactments proposed to be carried out by the present Government. Our jury system is a much venerated institution, dating back into remote antiquity, and many changes in the habits and customs of the community have crept in alongside the antiquity of the British jury. Not that any objection can be found, even at the present day, to the trial of a civil cause, or a criminal case, by twelve good men and true who "shall well and truly try," &c., &c. It is to the construction of and to the different kinds of juries that we propose to draw attention. As regards the origin of the jury system, it comes from such remote antiquity, that one learned writer believed it to have been of indigenous growth in the English soil, while others believe it to have been copied or borrowed from the Continent; probably it was of Scandinavian, Roman, Teutonic, Norman, and of Anglo-Saxon origin at one and the same time. A system occidental rather than oriental in its character. It is quite clear that in early days the present system of different kinds of juries did not exist. The original jury comprised all the witnesses in the case, holding the inquiry or inquisitorial proceeding. The oath delivered in the present day to a jurymen or to a witness has some similarity.

Until 1166 the jury system is lost in obscurity. Mr. John Richard Green, in his famous *History of the English People*, says, that it is in the provisions of the "Assize" (meaning a code issued with the sanction of the great council of barons and prelates) for the repression of crime, that we find the origin of trial by jury so often attributed to earlier times. Twelve lawful men of each hundred, with four from each township, were sworn to present those who were known

or reputed as criminals within their district for trial by ordeal. The jurors were then not merely witnesses, but sworn to act as judges also, in determining the value of the charge, and it is this double character of Henry II's jurors that has descended to our present day "grand jury" of the county or hundred. Two later steps bring it to its present modern condition. Under Edward I the witnesses acquainted with the particular fact in question were added in each case to the general jury, and by the separation of these two classes of jurors at a later time, the one became simply witnesses without any judicial powers, while the other ceased to be witnesses at all, and became our modern jurors, known as the "Petty Jury," judges of the testimony given; in other words, jurors became judges of fact instead of witnesses. Magna Charta completed the process, according to Dr. Stubbs, by enacting that the Assize should be held in the county court before the justices sent by the king. How the petty jurors became sub-divided into common jurors and special jurors for the trial of civil cases is less clear, but the distinction seems to have arisen out of, and to be inextricably mixed up with, the question of franchise and the qualification of Parliamentary voters, and later to have become regulated by many Acts of Parliament—the Jury Acts 1825, 1862, 1870, and the Common Law Procedure Acts 1852, 1854.

The qualification of a common juror, put shortly, is a person who has £10 by the year issuing out of freeholds, &c., or £20 out of leaseholds, or, being a householder, is rated in Middlesex not under £30, or in the counties not under £20, or shall occupy a house containing not less than fifteen windows.<sup>1</sup> This does not apply to towns or counties corporate possessing jurisdiction of their own. The qualification of a City of London juror also varies.

The qualification of a special juror is occupation of a

<sup>1</sup> Jury Act 1825, s. 1.

dwelling-house assessed at £100 in a town of 20,000 inhabitants, or rated at the value of £50 elsewhere, or occupation of premises other than a farm rated at not less than £100, or ownership of a farm rated at or over the value of £300. According to Forsyth's *History of Trial by Jury*, special jurors at *Nisi Prius* at Westminster were known in very early days, taken as they were from esquires or persons of high degree as merchants and bankers. The earliest Statute which recognised their existence was 3 Geo. II, c. 25, s. 15, and this speaks of special jurors as already well known. The Jury Act 1870, s. 6, confirmed the qualification of special jurors. As regards the County Courts, the qualification there is the same for those liable to serve at the Assizes.

Jurors in the Criminal Courts or the petty jury are distinct from the grand jury of the Assize or Quarter Sessions, their qualification is the same as the jurors in civil cases.<sup>1</sup> There appears to be no qualification for a coroner's jury other than a return of a competent number of good and lawful men. But it appears that no one is liable to serve on coroners' juries unless qualified to serve on common juries.<sup>2</sup>

As regards the payment of jurors, history gives little or no information. The present various and different payments to jurors appear to be the outcome of quite modern times, and often strike different juries as unjust and inconsistent. A special juror is allowed £1:1s. for each case which is tried out or not, no matter for how long it lasts. If a view is taken, he is entitled, if sworn, to £1:1s. per day, and often by arrangement between the parties special jurymen are specially remunerated. The common juror is at law not entitled to any payment, but it is usual in the High Court in London to

<sup>1</sup> 2 Hale, *Pleas of the Crown*, 264; 2 Hawkins, *Pleas of the Crown*, c. 43.

<sup>2</sup> 6 George III, c. 50, s. 52.

allow him 1s. per day, and 1s. 6d. in the country; for a view, 5s. per day. In the County Court, by 51 & 52<sup>nd</sup> Vict., c. 43, s. 101, 1s. per case is allowed. In the City of London Mayor's Court 2d. per case, in the Under Sheriff's Court 4d. per case. No fee is allowed in a criminal case or in a coroner's inquiry, but the London County Council sanction the payment of 2s. to jurymen summoned on a coroner's jury in London. So late as 1870, it was solemnly and seriously declared<sup>1</sup> that "Jurors having been sworn may, in the discretion of the Judge, be allowed at any time before giving their verdict the use of a fire, when out of Court, and be allowed reasonable refreshment, such refreshment to be procured at their own cost." It seems ludicrous to have inserted the above in a statute in order to give a judge discretionary power to order a fire, when such might have been left to the ordinary humanity of the judge himself or the officials of his Court. The only reason seems that some earlier statute must have existed to prevent "meat, drink or fire" being allowed to jurymen. Perhaps, however, it was merely by ancient custom; at any rate the principle was so firmly established that Sir H. Poland, in a lecture on "Changes in Criminal law and Procedure, 1800,"<sup>2</sup> gives an illustration of it which occurred before Mr. Justice Maule, well known for his ironical humour. The bailiff in charge of a jury having been sworn, to keep them "without meat, drink or fire," &c., asked if he might give one of the jurymen water. "Well," said the judge, "it is not meat and I should not call it drink; yes, you may." Until a recent statute<sup>3</sup> no jury was allowed to separate when trying a charge of felony. And another ludicrous incident is given, when in a trial for embezzlement, the jury were locked up for the night while the prisoner was let out on bail. Now only in murder, treason, and treason felony, are juries not permitted to separate.

<sup>1</sup> 33 & 34 Vict., c. 77, s. 23. The Jury Act 1870.

<sup>2</sup> *A Century of Law Reform*, p. 51.

<sup>3</sup> The Juries Detention Act 1897, 60 Vict., c. 18.

By section 22 of the Jury Act of 1870 a most reasonable provision was enacted, that the following remuneration should be allowed : one guinea to each special jurymen for each day of his attendance, and 10s. to each common juror for each day of his attendance, " the above-mentioned remuneration shall be paid by the parties to the causes to be tried, and for that purpose each of the said parties shall deposit such sum of money as may be determined by any rule of the Court in which the cause is depending," &c., &c.

Within eight months of the passing of the above enactment the whole of this section was suddenly repealed in great legislative hurry by 34 Vict., c. 2 in the following year, 1871. The reason section 22 of the Jury Act 1870 was so hurriedly repealed was, that the section only provided for the payment of jurors by the litigants themselves, so that if the cases to be tried were few and the litigants had paid all they were called upon to pay, the officers of the Court would have been left in a state of bankruptcy, so far as being unable to pay each of the jurymen attending for their services. Reading the debates<sup>1</sup> in the House of Commons repealing section 22, it is quite clear that the legislature approved the principle of section 22, that jurors should be paid by the day and not by the case, to be a right one; re-consideration of the whole question in another measure was then promised, and the Attorney-General, Sir Robert Collier, suggested bringing in another Bill confirming the principle of section 22 which he was then repealing.

The present day system of the remuneration of jurors by which a special jurymen trying several cases in one day should be remunerated with as many guineas as cases opened before him, whilst a common juror, or other jurors, serving perhaps for many days on one case should receive only 1s. or 1s. 6d. or practically nothing whatever, seems quite anomalous, especially when more closely diagnosed. No jury-

<sup>1</sup> Hansard, Vol. 204, p. 372.

man, special, common or otherwise, probably ever reckons on the amount he is likely to receive in payment for his services, but all very naturally expect and often ask for their daily or out of pocket expenses. That sect. 22 of 33 & 34 Vict., c. 77 (called "An Act to amend the laws relating to the qualification, summoning, attendance and remuneration of Special and Common Juries 1870"), should be re-enacted in a more complete and efficient way, would be no unreasonable request to Parliament, and a request which would no doubt be readily acceded to when it is realized that a Parliament 36 years ago confirmed the principle of the payment of jurors by the day to be a right and proper one.

A still more important question we desire to direct attention to, a much wider one, and which goes far deeper into the whole subject, than the question of the remuneration to jurors—a question which might well come under discussion in any proposed new legislation upon the Jury Acts—Whether some important change is not now desirable as to the qualification of jurors. It is a matter entirely for discussion, and we express no opinion whether the present qualifications, differing as they do, are advantageous or not. We only bear in mind the changes that have crept into the community alongside the jury system, how improved in estate (small though it still may be), in intelligence and in manners, the class is, from which common juries are drawn to-day, to what the same class were some thirty years ago and more. In these respects the common jurymen of to-day would compare even favourably with the special jurymen of the past. One is aware that in trade disputes special jurors get the credit of finding verdicts favouring employers and masters, while on the other hand, in cases before common juries and in the County Courts, between employers and workmen, these juries favour the class from which they are more often drawn, viz., servants and workmen.



Assuming that the two classes of jurymen are now more alike in respectability and intelligence, but that their prejudices are more accentuated than they formerly were, according to the cases that they have to try, is it wise to keep up these distinctions of qualifications so clearly defined, and merely because of the difference in estate? Would it not be wiser to have no such acute distinction, choosing men of varied estate, and choosing "good men and true," neither special nor common, but mixed, to sit on juries? No distinction as regards remuneration would of course follow. Such juries might be better panels from which to obtain verdicts for all kinds of suitors, and the present distinctions between special and common jurors might again become merged in what was originally known, previous to all the many and comparatively recent Jury Acts, as—the petty or ordinary jury of the country.

T. R. BRIDGWATER.

## V.—THE PROVINCE OF THE JUDGE AND OF THE JURY.

*(Continued from page 465.)*

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### LILBURN'S TRIAL IN 1653.

THE trial was resumed on August 10th, and finished on August 20th. Whether the Court sat continuously between these two dates, or not, we do not know. It appears from Whitelock that the trial was proceeding on the 11th and 16th; but according to Gardiner "it made little or no progress till the 19th," on which day Lilburn, having at last exhausted the patience of the Court, was told plainly that if he still refused to plead he would suffer the dreadful penalty of *peine forte et dure*; whereupon he promptly pleaded, Not Guilty.

What happened during these days, in the absence of any report, we can only surmise. Lilburn probably followed his old tactics of obstruction and delay. We can only assume that Mr. Norbury, or Mr. Maynard, or both, argued in support of the Exceptions. All we know is that the Court overruled the Exceptions, and the case went to the jury. We know nothing of the speeches of Counsel, the evidence given (if any), or the summing up of the judges.

It was not until August 20th (1653) that the Petty Jury was at last impannelled. It is, we think, a fair assumption to make that the jurors sworn had been summoned to attend on the first day of the trial, viz., August 10th, and that they had been in attendance every day of the trial in expectation of the prisoner pleading. In fact one of them, Michael Rayner, in his examination before the Council of State on August 23rd, said: "he was summoned to serve of the Jury upon Wednesday was seven night, and did constantly attend in Court, and upon the service, until the Tryall was over." If they were all in attendance in the same manner, they would hear not only Lilburn's speeches but also the argument of Counsel upon the Exceptions, as well as the long wrangle there was sure to be between the Court and the prisoner, and they could not fail to be impressed thereby. It was part of his policy to make it appear that the prosecution was acting with gross unfairness towards him, and that he was suffering martyrdom at their hands, in order to win the sympathy of the public and the jury. We do not know whether any of the jurors were challenged, either by the prosecution or the prisoner, or not. The same remarks as to their impartiality apply to them as to the jurors by whom he was tried in 1649. Professor Gardiner says that the duty of the jury, "according to the expressed opinion of the Court, was simple enough. An Act of Parliament had declared that Lilburne would be a felon if he returned to England. All that was incumbent on

the jurymen, therefore, was to take note of the fact of his return, and a verdict of guilty would of necessity follow.”<sup>1</sup>

In the *State Trials*<sup>2</sup> it is said, “Nothing of these three (?) last days’ Proceedings are (*sic*) printed.” “In a Book entitled ‘*Lieut.-Col. John Lilburne Tried and Cast, or his Case and Craft discovered*,’ 4to, 1653, is (*sic*) recited some of his speeches at his Trial, and animadversions on them: which shews that the Colonel made a notable Defence.’” This is the book of which I have been fortunate enough to procure a copy. Let us go to the original for his speeches.

Whitlock says, “he pleaded long for himself,” which we can quite believe.

It may not be out of place to recall here the observations which Prof. Gardiner makes upon these speeches, viz., that they are “probably derived from Lilburne’s speeches as presented to Parliament on Aug. 27th (1653). Shorthand was not in an advanced state in those days, and we cannot be quite sure of the verbal accuracy of the Notes, but it is highly probable that they represent fairly what Lilburne said.”<sup>3</sup>

Considerations of space forbid us giving any of these speeches except those which have a direct bearing on the subject of these articles.

In the following paragraphs, what Lilburn is supposed to have actually said is denoted by the italics; the comment thereon of the author of *Lilburn Tried and Cast* is enclosed within square brackets; other comments are printed in ordinary type. Each point of his defence is numbered.

1. “Concerning the Act whereupon he was indicted, this he said; *It was a lye and a falsehood; an Act that hath no Reason in it, no Law for it . . . that it was an unjust, unrighteous, and treacherous Act, and that he doubted not to shatter that Act in pieces.*”

<sup>1</sup> *Hist. Commonwealth*, Vol. II, pp. 247-8.

<sup>2</sup> Vol. V, p. 443.

<sup>3</sup> *Hist. Commonwealth*, Vol. II, p. 248.

2. "Concerning the late Parliament, hee said, *that they could not make an Act of Parliament since the King's head was cut off.*

3. "He said, *By the same Law they voted him to death, they might vote his honest twelve Jurie men*" to death.

["Was not this a very winning Argument? and enough to work effectually and feelingly upon affection of the Jury? It being for all the world as if some Arch Thief or Murderer should say; 'Yee Gentlemen of the Jurie, take heed what you doe in my Case: For if you hereafter shall be found guilty of such Robberies and Murders as I have committed, there will be as much reason and Law that ye suffer as myselfe.' . . . "They must needs be so; for they are of his owne choosing, and wish as much good to the State as he doth."]

4. "He said, *The Parliament before the King's head was cut off, and the Members taken out, were in their purity, a gallant Parliament, who were tender of the liberties, and of the wel-fare of the Nation: and walked in the steps of their Ancestors, and Fore-fathers; Then were the dayes of their virginity, they made good and righteous Laws, and then they had no force upon them: But since 1640 and 1641 there have been no good Laws made.*"

["All this (as the rest) is only a flash and winde; nothing at all to the purpose or thing in hand."]

5. "He affirmes, *that it was no lawfull Parliament that made that Act. Againe, The Parliament that made this Act of Banishment was no Parliament I will prove it: And the Parliament were rather Transgressors then I. Againe, Admit the Parliament legall, They had no power to send for mee. If there were any Judicatory in Parliament, it was the Lords' House, not the Commons.*

"If Cromwell, he reasoned, had turned out the late Parliament justly, its unjust actions ought not to be maintained."<sup>1</sup>

6. "To Mr. Prideaux Attorney-Generall he said, *You are a blood-thirsty man, and you come here to justifie your unrighteous Act: And I hope the Jury will take notice of your violence. It is the admiration of my soule, that he should be a Judge in his own case, to have a man sit as my Judge, that thirsteth after my blood.*"

Prof. Gardiner thinks that "his most telling arguments were those with a more personal flavour."

7. "For the Jury, he called them, *his honourable Jury*, and said, *they were the Keepers of the Liberties of England: And (I) will make it appear that the Jury are Judges of the Law, as well as of the Fact.*"

["Here we have the man in another temper; and we see, he can as well flatter men as reproach them. *Alterâ manu fert lapidem, panem ostendit alterâ.* This 'honourable Jury' he handled like Brass-pots, which be they never so huge yet a man may carry them by the eares where he will. It is by the eares that he takes them, and here he holds them off by base flattery: as *attributing unto them more then was ever given to any such Jury before*, and what belonged not unto them neither by Law nor Reason. Neverthesse having them (like Pots by the eares) away he carries them, from the rules of Justice, and from what was their work, (as proper to them) to doe that whereunto they were not called, nor in the least therein concerned."]

8. "Being to close the first particular as to the Speeches which he used at his Triall, we shall only add this. *I call Jehovah to witnesse* (saith he) *and do here protest before God, Angels and men, I am not the person intended to be banished by that Act: speaking of the Act whereupon he was Indicted.*"

["Such Asseverations and Oaths, we find frequently in his writings: A common practice of prophane and corrupt men, whereby to beguile ignorant and simple people."]

The only comment we can make on this is that its lack of taste was equalled by its lack of truth. Professor Gardiner

observes hereon: "In defending himself against the direction of the Court Lilburne asserted that he was not the Lieutenant Colonel John Lilburne mentioned in the Act; apparently either on the ground that he had ceased to be a lieutenant-colonel when he left the army in 1645, or merely to throw the burden of proof on the prosecution."<sup>1</sup> It was probably the latter, as he had, so late as July 30th, 1651, in the pamphlet entitled *A Just Reproof to Habdashers' Hall*, described himself as "Lieut.-Colonel John Lilburne." "Whether, however, Lilburne told a positive lie, or merely prevaricated, is a matter of little general interest. Believing as he did that he was being unfairly driven to the gallows he was quite ready to lie openly. At the same time it must be acknowledged that the lie was one that could have deceived nobody." The same remarks apply to his denial of his relations with the Royalists when abroad.

"He concluded by a warm appeal to the jury to be merciful to him as they sought for mercy themselves."<sup>2</sup>

These extracts from his speeches, and the comments on them, are sufficient to show us the general line of his defence. It was substantially the same as at his former trial in 1649, viz., a denial of the legality of the Rump Parliament, and all its Acts, including of course the Act of Banishment, and an assertion that the jury were judges of law as well as of fact. That he insisted on this point most strongly is shown not only by the extracts given above (particularly that numbered 7), but also by the Examination of the jury, to be given presently, which makes it abundantly clear and shows its effect on their minds.

Commenting on the passages quoted above, the author of *Lilburn Tried and Cast* asks: "Have not we fought well all this while, and laid out the blood and treasure of the Nation to a good end? that in conclusion we must have twelve men

<sup>1</sup> *Hist. Commonwealth*, Vol. II, p. 248.

<sup>2</sup> *Ibid*, Vol. II, p. 249.

(suppose two knaves and ten fools, as often it is), and these must be the Keepers of the Liberty of England, be above Judges, Recorders, yea the Parliament itself, to determine what is Law: and as they tell us, so we must acquiesce, right or wrong. There being no power or Authority above them, to appeal unto, be their Verdicts and sentences never so illegall and unjust. The matter here is so irratiōnall and absurd, as no answer is fit to be given to it; it is with those who are in Authority to take speedy care and course to suppress such insolent and base assertions, given out for no other end, but to keep up distempers among the people (p. 141)." And in a foot-note to p. 140, he declares: "Whether any of these 12 were fools, we shall not say; But whosoever shall read their Examination will conclude they were not honest men."

About this opinions may differ. However mistaken they may have been it does not follow that they were dishonest or false to their oaths. They no doubt acted according to their lights. All that we can say is, that the effect of such an argument, if accepted, would be to put the jury in even a stronger position than the Supreme Court of the United States of America, whose function it is to make a declaration as to the constitutionality and legality of any law passed by the legislature of any State in the Union. It would enable a common jury to pronounce a verdict as to the validity of every law made by Parliament. Such a view needs no refutation. The jury are certainly not and never were the judges of the law in this sense and to this extent.

Whatever were the arguments that Lilburn used they went home. After a prolonged absence the jury acquitted him, returning a verdict of "Not guilty of any crime worthy of death." The form of the verdict is significant, since it shows that the jury took upon themselves to decide what crimes were, and what were not, worthy of death.

According to Prof. Gardiner, "That verdict was received

with loud acclamations by three or four thousand spectators. It was of vastly more importance to the Government that the very soldiers who had been placed to guard the Court joined in the shouts, beating their drums and sounding their trumpets in spite of the orders of their officers as they passed along the streets returning to their quarters."<sup>1</sup>

On the 23rd August, 1653, in pursuance of an Order of Parliament of the 21st, the Jury who had tried Lilburn were summoned before the Council of State and examined as to their reasons for, and motives in, acquitting him. We give a short summary of such of the answers as are material. The comments thereon of the author of *Lilburn Tried and Cast* are again given in square brackets.

*Michael Rayner, of Friday-street, Leather-Seller, said "That he and the rest of the Jury tooke themselves to be Judges of the matter of Law, as well as matter of Fact. Although he confessed that the Bench did say, they were onely Judges of the Fact."*

*James Stephens of the Old Bailey, Haberdasher, being asked the questions in the first examination, said: "He acknowledged that he was satisfied that the Prisoner was the John Lilburn mentioned in the Act; nor did he question the validity of the Act, but the Jury having weighed all which was said, and conceiving themselves (notwithstanding what was said by the Counsell and Bench to the contrary) to be Judges of Law as well as of the Fact, they found him not guilty."*

[*"It will be much to the satisfaction of the Nation, that these men be required to give their Reasons, wherefore contrary to the Counsell and Bench, they peremptorily took it upon themselves to be Judges of the Law."*]

*Gilbert Gaync of Dunstons in the West, Grocer, said "The Jury did find as they did because they tooke themselves to be Judges of the Law, as well as of the Fact; and that although the Court did declare they were Judges of the Fact onely, yet*

<sup>1</sup> *Hist. Commonwealth*, Vol. II, p. 250.



*the Jury were otherwise persuaded from what they heard out of the Law-Books."*

[“These Law-Books will appear to be onely the wind which came from Lilburn, which blew their heads to and fro, like weather-cocks.”]

\* \* \* \* \*

It is quite obvious that some of the jurors prevaricated, fearing the consequences of having given such a verdict. It is, however, submitted that the answers of Rayner, Stephens, and Gayne conclusively show that they believed themselves to be Judges of Law as well as of Fact, and that this was the chief reason for their verdict.

Beyond being summoned before the Council and examined, the jurors do not appear to have been in any way molested. It speaks well for Cromwell that this was the case, yet even he had to consider public opinion.

It required no small amount of moral courage on the part of Lilburn's two juries to return the verdicts they did. We have seen what happened to the jury in Throckmorton's case. Jurors were fined and imprisoned after Lilburn's trials as well as before, and similar unpleasant consequences might have been expected by his two juries. Had they faltered in their resolution, through fear of such consequences, had they been less determined than they were, it is not too much to say that the juries in the case of Penn and Mead (out of which sprang Bushell's Case), and in the case of the Seven Bishops, might have brought in different verdicts, to the great loss of English freedom and the incalculable hinderance of the development of our political and legal institutions. The example of Lilburn's two juries without doubt inspired other juries.

The writer of *Lilburn Tried and Cast*, at the end of his account of the Examination of the Jury, indulges in a prophecy. “If we may freely here deliver our opinion, thus we think. The way of proceeding by twelve men

in the Tryall of Malefactors is near an end, and shortly to be swallowed up by the Supream Authority of the Nation, so as neither the name nor the thing shall be any more in the Commonwealth of England." Never was a vainer prophecy uttered. Although the rising sun of the jury was temporarily obscured by Cromwell, who partially abolished trial by jury, in consequence of Lilburn's two trials, and although it had to pass through clouds in the reign of Charles II, it ultimately shone forth in full splendour.

\* \* \* \* \*

The rest of Lilburn's life is soon told. Notwithstanding his acquittal, Cromwell, like Pharaoh, "hardened his heart and would not let him go." He was imprisoned in the Tower, "for the peace of the nation." On November 21st, 1653, he applied for a writ of *Habeas Corpus*, but the Upper Bench, acting no doubt upon instructions, refused to interfere; and on December 26th the Parliament decided that his imprisonment should continue. "If arbitrary acts are to be done at all," says Professor Gardiner, "it is better that they should avow themselves for what they really are." Lilburne had rendered at least one service to posterity. Never again was an Englishman tried for his life on a charge which eventually resolved itself into a breach of privilege.<sup>1</sup> But this was by no means the only service he rendered to posterity.

In March, 1654, he was transferred to Mount Orgueil Castle, in Jersey, and was there "so strictly kept that nothing more was heard of him than if he had been dead."<sup>2</sup> His friends issued another writ of *Habeas Corpus*, addressed to the Governor of the island, but that officer disregarded it, and his conduct was supported by the Council of State. In October, 1655, he was brought back to England and lodged for a time in Dover Castle. He was released on parole, turned Quaker, died at Eltham, in Kent, on

<sup>1</sup> *Hist. Commonwealth*, Vol. II, p. 251.

<sup>2</sup> Gooch, p. 255.

August 29th, 1657, about a year before the death of his great rival, Cromwell. To Cromwell's credit be it said that he continued till Lilburn's death the pension of 40s. a week allowed him for his maintenance in prison.

It has been reserved to the late Professor Gardiner, together with Professor Firth and Mr. G. P. Gooch, to do justice to Lilburn as a politician; but even they have not done him full justice as a law reformer, or rightly estimated the effect of his two trials upon the history of the jury system, as to do so did not fall within the scope of their works.

\* \* \* \* \*

We conclude our account of Lilburn's trials by two lengthy but important quotations. Of these one is from the pen of a great master of English history, the late Professor Gardiner; the other is from the pen of a great master of English Criminal law, the late Mr. Justice Stephen.

Professor Gardiner, in discussing the question "Are the jury judges of the law?" and referring to the verdict in Lilburn's trial in 1653, says:—

"So far as the law was concerned the jury had plainly over-stepped their functions. It was not their part to be judges of the law, or in any way to go behind an Act of Parliament. Yet modern jurists who condemn the verdict fail to take into account the special circumstances of the case. In the first place, the Act of Parliament on which the proceedings were taken emanated from a body, to which, as being a single House, the usage of centuries denied the name of Parliament. In the second place—and this is of far greater importance—the circumstances under which the Act was passed were such as to raise grave suspicions against its justice. Lilburne's violent attack on an influential member, upon which that Act was grounded, could scarcely excuse the action of the

House in sentencing him to banishment, on pain of death in the case of his return, without hearing him, in his own defence. It is possible—perhaps even probable—that Lilburne was entirely wrong in his charge against Hazlerigg. It was none the less a monstrous proceeding to expose a man to the gallows for a breach of privilege, without any judicial proceedings whatever to determine whether he had committed a crime or not. The fact is that a legal maxim, such as ‘Juries are not judges of the law,’ is simply accepted because more injustice is likely to be done if they assumed the power of interpreting the law than if they did not. No such case as that of Lilburne could possibly arise now, because no Parliament would dream of passing such an Act as was passed in Lilburne’s case. Against such proceeding the conscience of all disinterested men protests, and it was to this conscience that the jury gave voice in the verdict they delivered.”<sup>1</sup>

Mr. Justice Stephen, referring to both of Lilburn’s trials, says:—

“Such incidents as the acquittals of Lilburn are defeats which every revolutionary Government is exposed to if their proceedings are disapproved of by any considerable section of the community; and parallels to Lilburn’s trial might be found in many of the political prosecutions which took place under Louis Philippe. When an ancient and well-established system of government has been overthrown by force, that which is established in its place can hardly expect to have its laws supported and carried into execution merely as law, and apart from the personal opinion which jurors may have of their justice. Even under the quietest and best-established Governments it not infrequently happens that a jury will refuse to enforce the law if they think it hard in a particular case. Instances of this have occurred even in our own time.”<sup>2</sup>

<sup>1</sup> *Hist. Commonwealth*, Vol. II, pp. 249-50.

<sup>2</sup> *Hist. Crim. Law*, Vol. I, pp. 367-8.

These passages would appear to minimise the importance of Lilburn's two trials, to regard them as mere passing events and incidents of a day, and to under-estimate their effect upon the development of the jury system. With great respect to the opinions of such eminent writers, we venture to submit that this is not the true view. Professor Gardiner and Mr. Justice Stephen were not considering Lilburn's trials with special reference to the system of trial by jury.

The claim made by Lilburn that the jury had the right to decide all questions of law as well of fact, and his assertion that the judges were "no more, if they please, but cyphers, to pronounce the Sentence, or their Clerks to say Amen to them," are too extravagant to require serious consideration. In this wide sense the jury are certainly not, and never have been, judges of the law. From the point of view of law and history, as distinct from that of politics, such a claim will not bear examination. If that were the case, as Judge Jermyn rightly said, it would be "enough to destroy all the law in the land," and there would be an end of all law at once, unless the jury consisted of trained lawyers. The claim proved successful for its purpose in the two trials which we have considered, owing to the special circumstances of those two cases; but it was never again, so far as we are aware, asserted in that bald and crude form. Nevertheless, as we hope to show at some future time, there was a germ of truth and force in it, and when properly stated it involves an important principle, viz., the right of the jury to return a general verdict in criminal cases.

The point on which Lilburn went wrong was this. He assumed that the jury owed its origin to, and was in fact the survival of, the old, popular Anglo-Saxon Courts of the Shire, the Hundred and the Manor, in which, it is true, all the suitors were judges, both of law and of fact. This view of the origin of the jury was prevalent in his day and until quite recent times. Whereas it is now regarded as almost

certain that the jury sprang out of the Anglo-Norman *inquisitio*, an institution of royal origin, which never had anything to do with the decision of points of law, and whose functions were confined entirely to the ascertaining of facts. This latter view is now as well ascertained as any historical fact can be, though we do not yet know the exact stages by which this result was arrived at. After the Norman Conquest there came into existence a special class of men whose duty it was to know, to declare, and to administer the law, viz. the Common law judges; and they had been a well-recognised and established part of our legal system for a considerable time before the jury became an integral part thereof. To this class of men always belonged the decision of all questions of law. Whether this was desirable or not, in all cases, from a political point of view, is another question. Moreover the old Saxon local Courts had been almost completely superseded by the newer King's Courts which came into existence in the course of two centuries after the Norman Conquest. The jury was, therefore, just as much a "Norman intruder" as the judges themselves were, in fact more so, since it became part of our judicial machinery at a later date.

Admitted, however, that Lilburn was wrong in the extreme view he took of the functions of the jury (at all events in the form in which he expressed it), and that such view was an *à priori* one, based on an imperfect knowledge of law and history, it cannot, we think, be denied that such view appealed strongly to the popular imagination of the day and took possession of the public mind with great force. It suited the spirit of the times. The jury, from being regarded as an unpopular institution, a tool of despotism and tyranny, because of the paucity of acquittals in early times, came to be regarded, after Lilburn's two trials, as one of the most popular of our legal institutions, and as the great protection for public rights. As the result of the claim put

forward on their behalf by Lilburn, jurors saw that the jury in their hands might be turned into a powerful instrument for keeping a check on the administration of the law and for the attainment of freedom and justice, just as in the hands of the Crown it had previously been an instrument of injustice and oppression. The recognition of this fact involved an exercise of political sagacity of no mean order. This view of their functions also gave jurors a good conceit of themselves, and led them to entertain a high opinion of the importance, the dignity, and the responsibility of their office.

But it did more than this. It inaugurated that conflict between the judges and juries which lasted for nearly a hundred and fifty years, and was not finally settled till the passing of Fox's Libel Act, in 1792. The view, in a modified form, crops up in *Bushell's Case* (1670), the *Case of the Seven Bishops* (1688), *The Dean of St. Asaph's Case* (1779), and in nearly every great case involving constitutional principles throughout the eighteenth century. From that conflict the jury emerged triumphant, and in due time we hope to tell the story. Until it is told in full, and until after a short historical investigation of the origin of our judicial system and of the origin of the jury, it is impossible to determine the true relations between judge and jury, and show accurately and clearly what are the proper functions of each.

The importance of these two trials of John Lilburn therefore consists, not in their immediate effects, not in the mere fact that Lilburn saved his life and Cromwell received a severe check, but in the fact that they brought about a complete change in the tone, the temper, and the spirit of juries, and contributed powerfully to the establishment of their independence. It may be that Lilburn was altogether wrong in the theory which he propounded of the jury's powers and rights; but the jury took the bait, and its success was its justification. The vitality of a wrong but

plausible theory, when once it is started, is amazing; and although trial by jury was for a time partially abrogated by Cromwell, largely in consequence of Lilburn's acquittals, this theory never afterwards altogether lost its hold on the popular mind. Lilburn's two juries were undoubtedly influenced by political considerations, but they made this theory their excuse, their stalking-horse, as it were, and it answered its purpose. Thus it was politics that gave to the jury its power and popularity, and the subsequent history of the jury confirms this statement.

In the first part of this article we ventured to express our belief that these two trials of Lilburn proved the turning point of the jury system. We now venture to assert that the facts and considerations we have put forward prove the correctness of this view.

G. GLOVER ALEXANDER.

## VI.—THE INTERNATIONAL LAW ASSOCIATION AT BERLIN.

IN accepting the invitation of the leading law societies of Berlin to hold its twenty-third Conference in that city last month, the International Law Association not only furthered the progress of legal science, but performed a valuable service towards the promotion of national understanding and good feeling. Though the Association, as Mr. Justice Phillimore pointed out in his Presidential address, has its headquarters in England, its membership is drawn from all civilised nations, whose representatives mustered in great force at Berlin. Still the English element preponderated; and it may have seemed to some an experiment of doubtful expediency, to venture on a gathering in Germany at a time when causes of national rivalry between the two countries have been so assiduously magnified by an



irresponsible press. If any such anxiety existed as to the issue, it must have been completely dispelled on the opening day of the Conference. The English members went prepared to find friends in Germany—they were not disappointed. From the Emperor downwards, every one received them, not only with the most lavish hospitality, but with unmistakable proofs of candid and cordial friendship. The keynote was struck by His Imperial Majesty when he graciously threw open to the inspection of the members the *penetralia* of the Imperial Palace—a privilege not readily conceded to strangers, and correspondingly valued by every guest who was enabled to inspect the treasures of pictorial and decorative art, with which it is stored. Count von Kanitz, Master of the Ceremonies, presented the principal officers of the Conference to Prince Frederic Leopold, who accompanied the party through the various galleries and apartments, and afterwards presided at the luncheon which was served at the conclusion of the tour of inspection. His Majesty also addressed a personal and gratifying telegram to the Association, in reply to a message of respectful homage despatched by the President of the Conference at its first meeting.

At the Town Hall, two days earlier, the City Corporation had anticipated the warmth of the Imperial welcome by giving a largely attended reception and supper, and on the succeeding evening, at a banquet at which the members of the Conference were the guests of the Berlin legal societies, Mr. Justice Bigham had the opportunity of making a speech which strongly appealed to the imagination of the people of Berlin. Recalling the fact that fifty years ago he had come to Berlin as a schoolboy, the judge observed that that was a time of social unrest: 1848 was not forgotten: Palmerston was at the head of the British Cabinet; the Duke of Wellington was still alive. The German Empire was then only a vague idea not, as

now, a great fact: the inhabitants of Berlin numbered something like 250,000: it was now a great city with a population of over 3,000,000. But among all the changes of later years, one thing had not altered—the hearts of the German people. And, when the proposal to visit Berlin was put forward in the Council of the Association, he had at once advised its acceptance, knowing that the great city which had made his stay pleasant for him as a boy, would extend the like hospitality to those attending the Conference.

A banquet, at which the American and British Ambassadors were present, was given on Thursday evening by the Chamber of Commerce, the Guild of Merchants, and the Bankers' Union, when the event of the evening was an interesting and eloquent speech by Mr. Justice Kennedy.

The Conference opened on Tuesday morning for business in the new hall of the Chamber of Commerce, under the presidency of His Excellency, Dr. Koch, who, despite his many engagements, was assiduous in attendance, and when unavoidably absent, found able substitutes for the chair in Professors Gierke and Riesser, of the University of Berlin, and Dr. F. Mayer (of the Prussian Court of Appeal), as well as in the English judges. To the deep regret of all present the President of the Association, Mr. Justice Phillimore, was detained in England by ill-health. The inaugural address to which reference has just been made was read on his behalf by Mr. Justice Kennedy,—whose tact and energy were conspicuous throughout the week and contributed in no small measure to the smooth working of the programme, and the success of the conference.

Dr. E. von Darby and Sir Thomas Barclay contributed papers on the subject of International Arbitration. On the motion of the latter, further consideration of the subject was postponed, to enable certain proposals which he brought forward to be printed and placed in the hands of members. The Conference then heard a trio of papers on Neutrality,

read respectively by Professor von Martitz (who dealt with Mines in Naval Warfare), M. Gaston de Leval (Brussels), and Mr. J. E. R. Stephens (Editor of Thring's *Criminal Law of the Navy*). M. Gaston de Leval submitted a series of propositions regarding mines, wireless telegraphy, and the special treatment of ocean liners and mail steamers, which were referred to a committee to be appointed by the Executive, as were also Mr. Stephens' recommendations. These latter went a good deal further than the present law, and proposed to limit visit and search to the theatre of war, and to enable neutral ships to be protected by official certificates granted by their own State. The last-named provision was warmly criticised by Mr. Beckett-Hill (Liverpool) as impractical. But it is substantially the proposition brought forward by Mr. Douglas Owen and approved with one dissentient (the present writer) at last year's meeting of the Association at Christiania.

Sir Thomas Barclay interested the Conference by reporting the substance of the resolutions of the Institute of International Law respecting mines, which virtually agreed with the conclusions arrived at by Professor von Martitz. The essential feature is the absolute prohibition of floating and detachable mines, and the limitation of the use of fixed mines to territorial waters.

Mr. Charteris (Glasgow) read a valuable paper on the question of Territorial Jurisdiction in wide bays. As we refer to this subject elsewhere,<sup>1</sup> we need only remark that this paper collected in a moderate compass the principal *data* on the limits of territorial waters, besides treating in detail of the special fishery legislation which came up for discussion in the Moray Firth case.

On Wednesday, Mr. Justice Kennedy read a paper on the Exemption of Private Property from Maritime Capture which is reproduced *in extenso*, in another part of this issue.<sup>2</sup>

<sup>1</sup> See p. 97.

<sup>2</sup> See p. 28.

Framed in a spirit of high judicial impartiality, the learned Author's essay fulfilled his intention completely, which was rather to explain the subject than to theorise upon it. Indeed, its detachment was so pronounced that partisans of varying schools of thought found grounds for claiming the Author as a supporter of their respective views—a tolerably sufficient guarantee of his freedom from prejudice. In the discussion on this paper Sir Thomas Barclay pointed out that contraband must always remain seizable; and that it was of little use to exempt enemy property from capture in name, while allowing belligerents to go on seizing it under a wide definition of contraband (such as might include provisions and machinery, railway plant and chemicals). It was agreed that a special Committee be appointed to consider the question under this aspect.

Two Berlin lawyers of great experience in cases affecting British and American subjects in Germany, Dr. V. Schneider (to whom, as Secretary of the Reception Committee, great part of the success of the Conference is due) and Dr. S. Goldschmidt, read papers on "Pauper Foreign Litigants" and "Security for Costs," in which they drew attention to the difficulties created by the absence of any formal provisions of English law on which reciprocity could be based by the German Courts in favour of British litigants in poor circumstances.

The subject of conflicting rules as to nationality and naturalization was introduced by Dr. Ernö Wittmann, of Buda-Pesth, in a profound and stimulating paper. The commanding influence which nationality has of late acquired on the Continent, as the criterion of status in Private law, has had one unexpected result, in creating a reflex tendency to decide questions of nationality and naturalization on Private law principles. Of this tendency Dr. Wittmann's paper offers a striking example. He would ascertain, for instance, the capacity of a Dane to become naturalized in

France, by a reference to his capacity for private juristic acts. But it is quite evident that a person's capacity for private affairs is an altogether different thing from his capacity for public international transactions. We are in a different order of ideas, and it is only the important bearing which nationality now exercises on private law questions which induces the confusion of the two.

Dr. G. Marais, of Paris, contributed a concise but well-reasoned and well-expressed essay on the Nationality of Corporations, in which the same tendency again showed itself. Having accepted nationality as the grand criterion of Private law, we are driven to find a nationality for corporations, which, having no soul, can owe no real allegiance. It is not so much that the Continental jurist arrives at this result by any such logical process, as that he is so penetrated by the idea of the all-important bearing of nationality on Private law, that he never seriously thinks of the possibility of a normal corporation being without it. Just in the same way, an English lawyer racks his brain to find out what is the real domicile of a joint stock company, which has no home and never will have one. In the view taken by Dr. Marais, it is the law of the place where the corporation is managed rather than that of the State which creates it, or of the territory where it carries on its material operations, which is to be considered as specially applicable to it.

Dr. Sieveking, of Hamburg, contributed a most convincing paper on the vexed question of the policy embodied in the American Harter Act—that of preventing shipowners from declining responsibility for negligence in relation to the carriage of goods under bills of lading. He pointed out that such an enactment merely cripples the sea-going commerce of the country which adopts it. The freight of goods is fixed by economic laws, and if the ship-owner is to be obliged to become an insurer of his crew's carefulness,

the inevitable result would be the raising of freights by way of premium. Otherwise the business of shipping, which is even now carried on at a minimum of profit, would become unprofitable. The well-worn arguments based on the helpless position of the shipper in face of the shipping rings, were dismissed with the obvious remark that shippers can and do organise rings of their own.

On the same subject, Mr. Justice Walton gave expression to views almost precisely coinciding with those of Dr. Sieveking. Both distinguished jurists admitted that, as a voluntary term in bills of lading, a clause drawn so as to satisfy the Harter Act is a reasonable provision which might well be regarded as normal; both questioned the policy of forcing it on unwilling parties. Mr. Justice Bigham added a forcible protest against preventing business men from making their own contracts in their own way; and Mr. Justice Kennedy expressed his entire agreement—remarking that the undoubted evils of “rings” and “trusts” could best be met by local competition animated by high national spirit, and by special legislation only in cases of proved necessity. Mr. Verneaux (Messageries Maritimes) and other speakers followed on the same side, and the sentiment of the Conference was unmistakably in their favour: so much so that a resolution condemning the Harter Act root and branch would certainly have been carried by a large majority, and not (as at Christiania last year) by a mere casting vote. But cautious counsels prevailed, and after Mr. Eckstein (Hamburg) and Dr. Hindenburg (Copenhagen) had spoken on the opposite side (the former laying stress on the hurry with which bills of lading are signed, and the latter on the “loss of national wealth” involved), a somewhat colourless resolution was unanimously accepted to the effect that the Conference at present saw no reason for legislation on the lines of the Harter Act, but recognised that attention ought to be devoted to the subject, and invited the commercial

public to furnish the Association with facts tending to show that such legislation is required. In the course of the debate Mr. Eugene Carver, of Boston, gave an account of the genesis of the Act, and of the compromise upon which the United States' Senate successfully insisted. As the speaker was concerned as counsel in the negotiations between the Houses, his first-hand information was illuminative: and he made the further point, that any European nation which adopted the Harter Act must also adopt the Common law of the United States with which it is inextricably bound up. Mr. Justice Walton's paper was notable as reflecting the attitude of a large section of thoughtful people in England, who are deeply impressed by the evident favour which is now shown to State interference in private life and business, whilst at the same time they are penetrated by a feeling of deep distrust of its probable results.

After Dr. von der Leyen, of the Ministry of Public Works, had evoked some humour from the unpromising subject of the Bern Railway Transport of Goods Convention—a topic on which he spoke with great clearness and force—the subject of International Arbitration was again brought up by Sir T. Barclay. Members had now in their hands a print of additional clauses recommended by him for adoption in arbitration treaties, providing for a joint judicial inquiry in cases affecting “vital interests and national honour,” which, as he truly said, are really the only dangerous cases, and are not referable to arbitration under the Hague Convention. Dr. Evans Darby declared himself hostile to any such encroachment on what he considered should be the exclusive province of the Hague Tribunal; but the proposals were generally viewed with favour, and referred to a committee.

Mr. Justice Phillimore's paper on Divorce Jurisdiction received much approval as an able summary of the position. It was supplemented by Mr. J. Arthur Barratt (London), in

an interesting and closely reasoned speech dealing with the American aspect of the question.

On Friday, on the proposition of Dr. Kämpf, the Conference expressed its willingness to further the Unification of the Law of Bills of Exchange, after which the Draft Code of Rules for the recognition of foreign companies abroad, provisionally approved at Christiania, was discussed. Dr. Marais (Paris), submitted a paper, in which the Draft Code was sharply criticised, and Prince de Cassano (Rome) and Professor Jitta (Amsterdam), also expressed their disagreement with some of its terms, but in the event the Code was accepted in principle.

The subject of General Average was then brought forward in papers by M. Govare (Paris), and M. Langlois (Antwerp), the latter proposing a permanent International Commission of average adjusters to deal with cases of difficulty as they occur. Many members, including Mr. Ulrich (Berlin), participated in an interesting discussion which followed, and which resulted in the adoption of M. Langlois' proposal.

A paper, by Commandant Riondel (Nantes), strongly urging the adoption of international trade-routes as one effective method of avoidance of collisions at sea, closed the work of the Session, which was pronounced at an end by Dr. Koch, after those who had entertained the Association so hospitably had been appropriately thanked, and invitations had been offered the Association to meet in America in 1907, and in 1908 at Buda-Pesth. An enthusiastic *Abschiedabend* was given at the Zoological Gardens in the evening, when the international good-feeling displayed was most remarkable.

From first to last, the cordiality of Berlin towards the visitors, and in particular to the English members, was signal and unmistakable. The princely hospitality which left no moment of leisure without its lavish entertainment, is, of itself, no proof of this. But no one who experienced



personally the kindness of the hosts, who listened to such eloquent speeches as that of Professor Kohler in praise of English jurisprudence, and that of Professor Riesser, on the ties which unite the two nations, or who had the privilege of being welcomed into Berlin homes, could fail to recognise that the Germans of Berlin wished nothing but good to England.

Lastly, mention should be made of an energetic, though unofficial, Committee, presided over by Frau Heyl, which took complete charge of the ladies who accompanied members of the Association to Berlin, and the unremitting efforts of whose members to give all the pleasure in their power to their visitors were crowned by the most ample and unqualified success.

T. BATY.

## VII.—CURRENT NOTES ON INTERNATIONAL LAW.

### The Moray Firth Case.

LORD SALVESEN held, in a recent case in which ladies who were graduates of Edinburgh claimed parliamentary votes, on the clear words of certain statutes, that the Common law disability depriving them of political rights must be read into those enactments. It seems strange, therefore, that in the Moray Firth trawling case, just decided by twelve judges, their lordships felt themselves bound by the precise words of a statute, and held themselves incompetent to import into their construction the general principles of jurisdiction. The fact that statutory bye-laws prohibited trawling within a line drawn far out at sea, was held to be conclusive, and to subject foreigners to penalties for trawling within the limits prescribed by it. But it is evident that statutes are passed with reference to the

ambit of the enacting authority's powers. A British statute prohibiting drunkenness under a penalty of £5<sup>s</sup> would never be supposed to apply to Frenchmen, or, indeed, to Englishmen, who got intoxicated in Paris. We do not say that a legislature is not competent to penalize persons for acts done without its jurisdiction—but such is not the natural inference from an enactment framed in general terms. Although the Court will not declare a statute *ultra vires*, it will declare that it must be read with common sense. On the wider question whether the Moray Firth is within the realm, we confess to a prejudice in favour of the freedom of the seas. Great Britain upheld that principle with commendable firmness in the Behring Sea case, and it would be very unfortunate if any suspicion were to be thrown on her disinterestedness in the matter. The Moray Firth is far too open a gulf to be properly annexed by the owners of its shores. Indeed, the North Sea Convention limits territorial waters to the recognised three-mile limit: and if a vessel of one of the adhering Powers should be proceeded against for trawling in the Firth a very inconvenient situation would arise. Norway (to which country the ship in the present case belonged) is, for reasons of her own, not unwilling to acquiesce in wide claims over territorial waters. Mr. Charteris made it clear, in his paper read before the International Law Association last month, that it was evidently a decisive consideration with the Scottish judges that the prohibition would be ineffective unless it could be enforced against all comers. This is hardly sufficient ground for inferring that Parliament had deliberately assumed an extraordinary jurisdiction. And it did not find favour in the Irish case of *R. v. Pettit*,<sup>1</sup> in which Lord O'Brien said that he was not much impressed by the argument that if British subjects were held to be prohibited by such bye-laws, it would simply enure to the advantage

<sup>1</sup> [1902], 2 Ir. R. 1

of the Frenchman. "If he comes," said his lordship, "the bye-laws can easily be repealed, and the fishing thrown open again to our own people."

In that case the contention was that a bye-law of the Inspectors of Irish Fisheries, extending beyond the limits of territorial waters, was not binding even upon Irish people. The Court (Lord O'Brien, C. J., Gibson, Boyd and Andrews, JJ.), gave no countenance to the idea that the bye-law might be binding upon foreigners: and Gibson, J., was, indeed, of opinion that it was invalid even as against British subjects. There, of course, there was no question of a bay, or of the "King's chambers."

The preservation of fisheries, important as it is, is an inadequate ground for infringing the great principle of the freedom of the seas. The old claims of sovereignty over sea were not sentimental: they were founded on substantial grounds. States which policed and lighted waters had a distinct interest in governing them. But the claim to do so was decisively rejected centuries ago, and it is to be hoped that it will not be revived under new pretexts in our own age.

### **Lex Loci Contractus.**

In *Moulis v. Owen* (22 T. L. R. 770), the plaintiff sued on a cheque drawn in Algeria but payable in London. It was given in respect of a gaming debt (or rather, money borrowed to pay gaming debts) incurred in Algeria. The defence was that the legal effect of the instrument was governed by the law of England, and that this law made debts incurred in gaming abroad illegal consideration for cheques. As Darling, J., held that the law of England did not so extend to foreign gaming, it became necessary to decide whether it was applicable to the determination of the

validity of the bill, or not. Probably it was not:—"Subject to the provisions of this Act, the interpretation of the drawing . . . of a bill is determined by the law of the place where such contract is made" (45 & 46 Vict., c. 61, s. 72): this seems to cover the interpretation of the bill's validity. Supposing, however, that this enactment does not apply to questions of intrinsic validity, there are cases<sup>1</sup> in which judges of eminence have held different opinions as to the proper law to be applied for the determination of such questions: some holding that the parties evidently looked to the place of performance as governing the transaction and supplying the law for it—others holding that the *lex loci contractus* was paramount. The whole matter is simply one case of the problem of finding the "proper law" of a contract; and unless it has been incidentally decided by legislation, the general principle must prevail of choosing the law of the place with which the transaction has most substantial connection. In this case, Moulis not being even a British subject, the law of Algeria appears clearly to have been the proper law.

### The Institute of International Law.

That important scientific body, the Institute of International Law, met towards the end of September at its birthplace, Ghent. The criticism to which it is occasionally liable, and which every expert group almost necessarily incurs—namely, that it is too academical and somewhat unpractical—is exemplified by the startling recommendation adopted at the Conference that no hostilities shall be begun except upon due notice. There is no doubt something to be said for that knightly custom; but it is hopelessly out of touch with modern conditions. We print the proposal as translated into English (which language hardly accommodates itself to the elevation of its sentiments):—

<sup>1</sup> *Robinson v. Bland* ([1760], Burr 1077); *Quarrier v. Colston* ([1842], 1 Ph. 147).

- (1) That, in conformity with the traditions of International law, with the loyalty which the nations owe each other in their mutual relations, and in the common interest of all States, hostilities shall not begin without previous and unequivocal warning.
- (2) That such warning may take the form of a declaration of war pure and simple, or the form of an official ultimatum by the State desirous of beginning a war.
- (3) That hostilities may only be begun after the expiration of such lapse of time that the rule of previous and unequivocal warning may not be considered to have been eluded.

The only practical result of such a *régime* would be that acts of violence would frequently be committed, coupled with protestations that no war was intended, but only the seizure of "material guarantees." The Institute is said to have also enunciated as law, the proposition that the entrance of the land or sea forces of belligerents into neutral territory, and the use of such territory for purposes of war, are "forbidden." So far as the entry of land forces into neutral territory is concerned, this is a truism; so far as the entry of naval forces into neutral waters is concerned, it is distinctly untrue. The events of the Japanese War amply suffice to prove it. And what is meant by "use of territory for purposes of war"? The phrase may cover anything, from fighting battles to buying mules. The right of asylum is apparently recognised by the Institute, but only in cases of shipwreck or distress.

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The Institute (founding on the law of Rome, according to the method of Grotius) is said to have declared the air "free." It was asserted that the only rights which a State enjoys in it are those necessary to self-preservation. This would seem to concede a right of passage, by balloons or otherwise, over foreign territory—a novel proposition. And it is stated that the passage of wireless waves can only be opposed by the State over whose land they pass when necessary for its safety. This does not include, it would seem, any necessity short of the highest national importance, and would leave injury to individuals out of account. Such a rule needs, to say the least, close examination.

T. BATY.

## VIII.—NOTES ON RECENT CASES (ENGLISH).

IS there any tendency at present to limit the number of cases reported? It would seem so. Formerly the Law Reports of the Chancery Division ran to three volumes each year. For some time past two volumes have sufficed to contain them. And if the parts for the next two months are not bulkier than the parts for the last three months the second volume of Chancery Reports this year will be somewhat slim; the parts for August, September, and October, containing altogether just 145 pages.

If such tendency exists it is greatly to be encouraged. Multitudes of the cases formerly reported were of no earthly use, except for the purpose of darkening counsel. That was especially so with those dealing with the interpretation of wills. Hundreds and thousands of printed pages have been filled with reports of long arguments and long judgments where no conceivable point of law was involved, the sole question being what meaning the Court should put upon a will that in truth and in fact had no meaning at all. Then, when another meaningless will came up for interpretation, instead of trying to find out from the testator's nonsense what was really his sense, the Court was asked to find that out—as a distinguished judge once said—by referring to these interpretations of another testator's nonsense. If that sort of reporting is being restricted so much the better for everybody.

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Though the decisions reported are not numerous, some of them are very interesting and noteworthy. The most important, perhaps, is *In re Wallis & Grout's Contract* (L. R. [1906], 2 Ch. 206), in which Swinfen Eady, J., disapproved that old friend of every conveyancer, *Bolton v. London School Board* (L. R., 7 Ch. D. 766), which held

that where there was a recital of seisin in a deed over twenty years old, that, by virtue of sect. 2 of the Vendor and Purchaser Act 1874, relieved a vendor on an open contract from giving the purchaser a forty years' title. Swinfen Eady, J., distinguished the case before him from *Bolton v. London School Board* (*supra*), but declared that, if necessary, he would have refused to follow it. This will prove very awkward for persons wishing to sell who have bought on a title based on that erroneous decision.

The history of *Bolton v. London School Board* (*supra*) is a good example of the disadvantages of the English system of relying on precedent. Here is a decision which every competent lawyer knew was wrong, yet it has stood for law for nearly thirty years, and multitudes of titles have been accepted on the strength of it. No doubt this was largely due to the feeling that, although it was bad law, it would never be reversed, just because it had often been acted upon. But Swinfen Eady, J., says now that it cannot be followed, since it is absolutely contrary to the words of the Act of Parliament which says that a forty years' title must be given (Vendor and Purchaser Act 1874, s. 1).

Another important case is *Godden v. Hythe Burial Board* (L. R. [1906], 2 Ch. 270). Section 9 of the Burial Act 1855 enacts that "no ground not already used as or appropriated for a cemetery shall be used for burials . . . within the distance of one hundred yards from any dwelling-house, without the consent in writing of the owner, lessee and occupier of such house. The Court of Appeal, affirming the decision of Kekewich, J., held that "not already used as or appropriated for a cemetery" means so used or appropriated at the passing of the Burial Act 1855. The consequence is that anybody building a house within a hundred yards of a burial ground long after the burial ground is in use, is

entitled to an injunction to restrain burials in such ground. In other words, to be sure of being permitted to use any burial ground formed since 1855, the authorities must purchase all the land within a hundred yards of it! The Court seemed certain that Parliament could not have meant this, but this seems clearly what it has said.

*In re Corsellis, Freeborn v. Napper* (L. R. [1906], 2 Ch. 316), is not very well reported, and the decision is not altogether satisfactory. The facts as stated are these. Testator's father and mother were never married, but they lived together as married people, and testator was brought up with his seven natural brothers and sisters, and had always treated them as lawful relatives. One natural sister (Mary) died nineteen years before the date of the will, leaving children. It is to be presumed these were her lawful children, but the report does not say so. It does say, however, that there was no evidence that the testator knew of their existence, and neither they nor their mother were referred to in the will. By that will he left legacies to each of his natural brothers and sisters then living—describing them as “my brothers and sisters;” the residue he left in trust for his wife for life, and afterwards for “all my nephews and nieces then living.” One child of Mary's was living at the period indicated. Swinfen Eady, J., applying the rule applicable to legitimate relationship, held that Mary's child was entitled to take as a niece.

It is a pity the case of *In re Mayo, Chester v. Keir* (L. R. [1901], 1 Ch. 404), was not brought to his lordship's attention. That was a case where a testator left a fund among the “three children” a certain woman had before her marriage. The woman had three children, of whom the testator was supposed to be the father, and a fourth, of whose existence he did not seem to be aware. Farwell, J.,



declined to follow the rule applicable to legitimate children, and strike out the "three" as a mistake, holding that rule did not apply, since a natural child cannot claim as a child unless he can show that the testator intended to include him under that description. Here it may be said that the testator, in treating Mary as his sister, had shown an intention of treating her children as his nephews and nieces, even though he did not know she had any children, but this is rather far-fetched. Besides, the rule applicable to legitimate relationship which Swinfen Eady, J., purported to apply, is not based on intention. Unknown legitimate relations are included under a gift to relations because they are in fact relations; not because of any intention on the part of the testator to include them.

In *In re Wright, Whitworth v. Wright* (L. R. [1906], 2 Ch. 288), *In re Bradshaw* (L. R. [1902], 1 Ch. 436), was for the third time dissented from. Let us hope counsel will now be convinced that that unhappy decision is really dead, and not continue pulling it out of its grave from time to time to see if it is.

The question, What is a legal charity? was once more before the Court in *In re Pardoe, McLaughlin v. Attorney-General* (L. R. [1906], 2 Ch. 184), when it was held that providing for ringing church bells and providing and maintaining tombs for poor persons were both charitable purposes. *Grimond v. Grimond* (L. R. [1905], A. C. 124), which more than one judge has had some difficulty in understanding, was again considered. Kekewich, J., seemed inclined to agree with the Irish decision (*Arnott v. Arnott* [1906], 1 I. R. 127), that that case depends largely on the Scotch law of charities.

Note that "shall" before a verb does not necessarily indicate futurity (*In re Tattersall, Topham v. Armitage*, L. R.

[1906], 2 Ch. 399); that when it is said that an appointment under a special power must, for purposes of the rule against perpetuities, be read into the instrument creating the power, that does not mean read as if it had been in it when the instrument was made (*In re Thompson, Thompson v. Thompson*, L. R. [1906], 2 Ch. 199); and that a person electing against an instrument is not thereby disentitled to compensation for what he loses by such election (*In re Booth, Booth v. Robinson*, L. R. [1906], 2 Ch. 321).

J. A. S.

As the Common law Courts had no jurisdiction over costs except by statute, and as no statute gave them power over costs in *certiorari*, the applicant for the writ had, under the old practice, to enter into recognisances by which, if he were unsuccessful, he had to pay costs, and if he were successful he had to meet his own expenses, finding, if he could, sufficient reward in his success. Then came the Judicature Act, but by the *London County Council v. West Ham Overseers* (L. R. [1892], 2 Q. B. 173), which was a case which in earlier times would have been brought up by *certiorari*, it was decided that by the combined effect of sects. 4 and 5 of the Judicature Act, the Act had made no change in the inability of the Court to deal with costs. Subsequently, in *Reg. v. City of London Justices*, it was held, though not in a case of *certiorari*, that whenever before the Judicature Act any power had existed in any of the Courts to give costs, that power became vested in the High Court. This was an important decision, and the principle has now, in *Rex v. Woodhouse* (L. R. [1906], 2 K. B. 501; 75 L. J. R., K. B. 745) been applied specifically to *certiorari*. Moulton, L.J., put his judgment on broad grounds similar to those in *Reg. v. City of London Justices*; so there is no formal over-ruling of *London County Council v. West Ham Overseers*, though the case loses its importance.

*Rex v. Murray* (L. R. [1906], 2 K. B. 385; 75 L. J. R., K. B. 593) is a case in which an excellent principle was stretched to its utmost limit. Quarter Sessions, in its anxiety to avoid embarrassing a defence, refused to allow the amendment, under sect. 1 of the Criminal Procedure Act 1851, of an indictment by which persons were charged with breaking into a house and stealing jewellery, the ownership of which was laid in the tenant instead of in his wife. The consequence was that the Court had to quash the conviction of the prisoners, but expressed a strong view that the amendment ought to have been made. It is not easy to see in what way it could have embarrassed the prisoners; but the question need not have arisen if the real ownership of the property had been ascertained at the commencement of the prosecution. Most likely the character of the articles might have suggested the sex of the owner, and the effect of the Married Woman's Property Acts ought by this time to be common knowledge.

*In re Briggs, ex parte Wright* (L. R. [1906], 2 K. B. 209; 75 L. J. R., K. B. 591; 95 L. T. R. 61), is a good illustration of an instrument invalid for what it purports to be, yet effectual in another way. A document in deed form, assigning the book debts of a firm of two persons, required the signature of each member, but was executed by one partner only who wrote without authority the name of the other. So far, of course, the instrument had no operative power. But when the assignee presently gave notice to the firm's debtors, the document became, if it could be supported as "under the hand of the assignor" in the words of sub-sect. 6 of sect. 25 of the Judicature Act 1873, effectual in law to pass the legal right to the debts. And this support was afforded by sect. 6 of the Partnership Act 1890, for the ineffectual deed was nevertheless good as an equitable assignment, for, being executed by a partner, it was an "instrument relating

to the business of the firm," and executed in a "manner showing intention to bind the firm." And, therefore, the notice having been given before the firm became bankrupt was binding against the trustee in bankruptcy.

*Austin v. Newham* (L. R. [1906], 2 K. B. 167; 75 L. J. R., K. B. 563), would have had an additional interest to the mere reader of Reports if the plaintiff had sought the full rights which might have been accorded to him by the law. He held a house on an agreement for a year, "with the option of a lease after the aforesaid term at a rental of £30 per annum"; and the Court decided that he was entitled to what he asked for, which happened to be no more than a renewal to the end of the following year. But an interest is lent to the case by the opinion of Kennedy, J., that the terms of the agreement would have entitled the tenant to claim a lease for life. There is a good deal to support the view on general principles, but the learned judge based his opinion on *Kusel v. Watson* (L. R. [1877], 11 Ch. D. 129), in which an agreement between the parties gave the plaintiff a right to a lease with no term defined. Jessel, M.R., and Bramwell, L.J., were both of opinion that the words were sufficient to have supported a claim to a lease for life. But in that case also the point was left undecided, for as the defendant was himself only a leaseholder he could only be required to grant a lease for the residue of his own term, if the plaintiff should live so long.

*Diestal v. Stevenson* (L. R. [1906], 2 K. B. 345; 75 L. J. R., K. B. 797), no doubt rightly decided, in the contract which the parties had made for the supply and receipt of coal in certain quantities at certain dates, that when they stipulated that non-execution should involve a "penalty" of one shilling per ton "and the amount of proved loss if any on freight actually arranged," what they really intended was

that the damages should be not a penalty but liquidated damages. It is of course quite possible that a person unused to a business in which legal phrases are common speech, should assume that a named penalty meant the precise sum which would have to be paid on the conditions named. But it is surely surprising that two persons in the same trade, in settling an agreement between themselves defining the conditions of an ordinary incident in the business of each, should have been unacquainted with the accepted meaning of the well-known term which they employed.

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In *Wheatley v. Smithers* (L. R. [1906], 2 K. B. 321; 75 L. J. R., K. B. 627; 95 L. T. R., K. B. 96), Ridley, J., expressed himself as not prepared to say that a County Court judge was wrong in deciding, when the case was before him, that an auctioneer is not a trader, and therefore that there is no implied power in a partner in such a business to accept in the firm's name a bill of exchange outside the partnership affairs. In Lindley's *Partnership*, 5th edition, p. 130, 7th edition, p. 155, it is said with respect to partnerships which are not trading partnerships, whether one partner has any implied authority to bind his co-partner by putting the name of the firm to a negotiable instrument, depends upon the nature of the business; and in Chalmer's *Bills of Exchange* it is stated that a partner in a non-trading firm has *prima facie* no authority to render his co-partner liable by signing bills in the partnership name. This of course does not apply to cheques. But in *Forster v. Macreth* (L. R. [1867], 2 Ex. 163), both Kelly, C.B., and Martin, B., were of opinion that, as regards its practical effect, a post-dated cheque is the same thing as a bill of exchange. Possibly the question may some day arise on this point.

The mischief in *Capital and Counties Bank v. Gordon and London City and Midland Bank v. the same*, noted in our issue of February, 1904 (Vol. XXIX, No. 331, p. 226), has now, after several fruitless efforts, been remedied by Bills of Exchange (Crossed Cheques) Act 1906 (6 Edw. 7, Ch. 17), which enacts that a banker receives payment of a crossed cheque for a customer within the meaning of the Act of 1882, sect. 82, notwithstanding that he credits his customer's account with the amount of the cheque before receiving payment thereof. This will be a satisfaction to all bankers and to their customers also.

T. J. B.

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#### IRISH CASES.

It is not uncommon in Ireland, among tenants of small holdings, that when a husband dies intestate his widow and children remain on in possession of the holding without taking out any administration or making any actual division of the assets. This habit has given the Courts some delicate problems to solve, as to the rights which the persons so remaining in possession acquire *inter se* under the Statutes of Limitations, and as to the rights of children who have stayed on the farm against others who have left it. One can hardly say that all these problems have yet been quite settled by authority; and in particular, there have been conflicts of decision as to the nature of the interests acquired by the next-of-kin—whether joint tenancies or tenancies in common. *Smith v. Savage* ([1906], 1 Ir. R. 466) illustrates the curious complex of undivided interests which may arise. A. dies intestate, possessed of a tenancy in a holding: of his six children (none of them minors) three remain in possession of the holding, while three others leave it and remain out of possession for more than twelve years; there is no administration. What is the nature of the interest acquired by the three home-keeping children? The Court replies

that we must distinguish between their interests in respect of their own<sup>c</sup> original shares, and those which they acquire in the shares of the "foris-familiated" children who have gone away. As to the former interests, they take tenancies in common, but in the latter they take joint tenancies. "We have some of the next-of-kin taking, at the same moment of time and by one common<sup>c</sup> wrongful title, wrongful possession of the share of the absent one, and continuing in such possession for the statutory period; all the requisities of a joint tenancy seem to be present." In the case put, therefore, the three children in question are each tenants in common of an undivided sixth of the holding, while they are joint tenants of an undivided moiety.

The strict rule of construction that a bequest to "children" means, *prima facie*, "legitimate children only," is more and more yielding to indications of contrary intention on the part of the testator. But there still remains one important proviso: you must not infer that contrary intention *merely* from surrounding circumstances—you must find on the face of the will itself some indication that the word "children" was used in a meaning which would apply to and include illegitimate children. Yet the Courts are becoming satisfied with a slighter indication to this effect than they would formerly have been; this seems to be the way in which the rule is really being made more lax. Once you have got this indication of intention, then you may at once resort to evidence of surrounding circumstances to construe the word "children." And if you find a testator referring to a woman, whom he knew to be really unmarried, as a wife, and making a gift to her children, a strong presumption will arise that he intended to include illegitimate children.

There is nothing very new in any of these propositions, which are believed fairly to represent the present law. They are exemplified by *O'Loughlin v. Bellew* ([1906], 1 Ir. R. 487).

A testatrix made a gift to the "children" of her daughter, describing her by the name of a man with whom she had lived for several years without being married to him. The daughter's children were all illegitimate. The Court considered that the description of the daughter by her "quasi married" name was a sufficient indication of an intention to use the word "children" in a meaning which might include illegimates. There was then abundant evidence that the testatrix as a fact knew all about her daughter's relations and the state of her family, and the conclusion easily followed that she did in fact mean by "children," illegitimate children.

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The sea is a highway; it is so in legal effect, not less than in the speculations of writers on sea-power and empire. And a man whose land adjoins a highway has clearly a right to step off his land on to the highway when he pleases. *Coppinger v. Sheehan* ([1906], 1 Ir. R. 519), shows the extension of this right when the highway adjoining one's land is the sea. The right does not then cease to exist because the tide causes the highway, so to speak, to go away from the land at some times of the day, and leaves a strip of foreshore between. Putting the matter more precisely: the owners of lands bounded by the sea have a right of access for the purpose of navigation, which includes a right of access to the sea across the portion of the foreshore left by the receding tide. An improper obstruction of this right (as in this case, by heaping stones on the foreshore) will be restrained by injunction.

It should be noticed that in this case the foreshore belonged to the Crown: it is not quite so clear that a right of access across it would continue if it had passed into private hands.

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As most people know, the Catholic Emancipation Act prohibits the residence of monastic orders within the



kingdom under severe penalties; and most people know also that these penalties have never been enforced, and that the prohibition has become a dead letter. But the penal clauses of this statute have had one important indirect effect; they have been construed as making gifts to such monastic communities void, as being made for an illegal object. It has been settled, however, that this is so only when the gift is made to the community *quâ* community: a gift to individual members of the order for the time being may be good. In *Cussen v. Hynes* ([1906], 1 Ir. R. 539), an attempt was made to suggest another relaxation of the rule, but unsuccessfully. There were two bequests made to a convent and a church, both of which were shown to belong to the Franciscan Order. It was suggested that the main object of the convent, and that to which the gifts would be applied, was the education of priests who would be foreign missionaries, and that therefore the assumedly illegal object would be performed out of Ireland, and so would not come within the prohibition. This seems to have been a despairing argument, and the Court found no difficulty in answering it by saying, "but to become missionaries they must first become Capuchin priests." The gifts were held void.

The state of the law is somewhat curious, and can only yield to legislation, but no legislative change in this regard seems immediately probable.

The extreme power over costs, possessed by a judge of the High Court since the Judicature Act, is exemplified by *Whimmore v. O'Reilly* ([1906], 2 Ir. R. 357). In this case a plaintiff recovered £1 in an action for £30 brought in the King's Bench Division for breach of an agreement to keep demised premises in repair. It was tried by a judge without a jury, and the judge, considering that the action was trivial and insignificant, should have been brought in the County Court, and was quite unfit to be tried in

the High Court, gave judgment for £1, with such costs as that sum would carry in the County Court, and ordered the plaintiff to pay the defendant's general costs of the action less the £1 and the County Court costs. On appeal from this order as to costs, a full Divisional Court were equally divided; but the Court of Appeal unanimously held that there were materials before the judge at the trial sufficient to justify him in exercising his discretion of ordering the plaintiff to pay the defendant's costs, and that his order in this respect was not subject to review.

While costs in the Common-law Courts were governed by statutes (6 Edw. I and others), which left the Court no discretion, this was never so in Chancery. There the Court in its discretion could do practically anything with costs, except order a successful defendant to pay all the costs of an action. Under the Irish Judicature Act, *all* cases tried by a judge without a jury come under the old Chancery rule. The only conditions under which an appellate Court can review an order as to costs, purporting to be made in the exercise of a judge's discretion, are thus summarized by Fitz-Gibbon, L. J.: (1) if it is shown that he has not exercised a judicial discretion at all, but acted arbitrarily, capriciously, or recklessly; (2) if he has acted on wrong grounds, *i. e.*, based his decision on grounds which the law does not recognize; or (3) if there is no evidence of the existence of any lawful ground for his decision.

A workwoman is employed at eight shillings per week for a week of 55½ hours, with a bonus of two shillings for full attendance, and for that alone. Printed rules posted in the factory and read by her provide that any person absent without sufficient reason shall lose the bonus. She is absent for a quarter-day without sufficient reason, and there is consequently deducted from the weekly sum of ten shillings otherwise payable to her, 2s. 4d., being a quarter-day's

wages and the bonus. Held, that this deduction is not an offence under the Truck Acts—it is not a fine. *Deane v. Wilson* ([1906] 2 Ir. R. 405).

J. S. B.

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### SCOTCH CASES.

The question of the burden of costs as between two defendants, one successful and the other unsuccessful, and as between both defendants and the plaintiff, appears to be better defined and more equitably settled in Scotland than in England. In England, Mr. Justice Bray had the matter before him on the 26th January last, in *Bullock v. London General Omnibus Company and Trollope*. He came to the conclusion that the successful plaintiff must pay the expenses of the successful defendant, and recover these expenses from the unsuccessful defendant. The judgment against the latter was drawn up to include, in name of the plaintiff, the costs of the successful defendant disbursed by him. This ruling seems to be consistent with that in *Sanderson v. Blyth Theatre Company and Hope* (L. R. [1903], 2 K. B. 533), but it seems scarcely equitable. A case can easily be imagined in which a plaintiff, who presumably was justified in bringing his action against both defendants, might be ruined by his success against an impecunious defendant, he being at the same time saddled with all the costs of the successful co-defendant.

The Scottish practice is brought out in the recent case of *Morrison v. Waters and Murphy* (43 S. L. R. 646). As in the English cases, the first point to be considered was whether the pursuer was justified by the circumstances, or by the defender's conduct, in bringing both defenders into Court. The normal rule is that he must, after due inquiry, select the defender against whom he asks a verdict. But, assuming justification for the double claim, the Scottish Courts will grant a direct judgment for expenses, at the instance of

the successful defender, against the unsuccessful defender, without requiring the intervention of the pursuer or saddling him with intermediate responsibility. This has been well settled in Scotland by such cases as *Caledonian Railway Company v. Greenock Sacking Company and others* ([1875], 2 R. 671), *Macintosh v. Galbraith and Arthur* ([1900], 3 F. 66); *Thomson v. Kerr and others* ([1901], 3 F. 355).

Judgment was given on the same day (20th July) in two cases in which exclusive property was claimed in a trade name. In the one case a personal name was claimed even as against other holders of the same patronymic: in the other the name was that of an article which, by extensive advertising, had become familiar to the public. In neither case were the claimants to exclusive rights successful; but the reasons in each case were substantially different.

In *Dunlop Pneumatic Tyre Company, Limited v. Dunlop Motor Company, Limited* (43 S. L. R. 784), a well-known pneumatic tyre company sued a small joint-stock company in Kilmarnock which had been formed out of a private firm founded by two brothers named Dunlop. The complainers asked for interdict against the use of the name under which the respondents' company had been registered, which was alleged to be "calculated to deceive or mislead the public into the belief that the respondents' company was the same company as the complainers' company." The Lord Ordinary (Dundas) granted interdict; but the Second Division recalled the judgment, holding, in the words of Lord Kyllachy, that "it assumed, if indeed it did not express, that the complainers had in some way acquired the exclusive right to the use of the name 'Dunlop,' not only with respect to goods in which they themselves dealt, but with respect (if not to all goods) at all events to all goods which were within the scope of the respondents' business." On the general question of the use of a personal name, Lord

Kyllachy said :—"The law has never yet, at least so far as I know, gone the length of debarring any merchant or manufacturer from selling his own goods under his own name, unless there has been, in addition to the use of that name, some overt act or course of conduct plainly indicative of fraud—that is to say, of dishonest effort to pass off his own goods as the goods of another."

In *Bile Bean Manufacturing Company v. Davidson* (43 S. L. R. 827), the Lord Ordinary (Ardwall), in a lengthy interlocutor, formulated a scathing indictment of the advertising methods of the complainers. It was disclosed at the proof, though not stated on record, that something like £300,000 had been spent in perpetrating "a gigantic and too successful fraud." The complainers' pill was probably some formula taken from the *materia medica*, but round this was woven a network of pure fabrication. It was publicly advertised, for example, as a natural vegetable substance discovered by a Mr. Charles Forde (an eminent scientist) in Australia, "which had for ages brought health and vigour to the natives of that island continent, but is now being introduced, at great expense, for the benefit of civilised nations." In the words of the Lord Justice-Clerk, "the place of the discovery, the mode of the discovery, the discovery itself, the instruments of research, the laboratories, the very existence of an eminent scientist named Forde, were all deliberate inventions." In these circumstances, the Lord Ordinary held that he was justified in refusing relief to the complainers as against a rival in trade who advertised his wares as "Davidson's Bile Beans." The Second Division sustained the judgment, holding that "the complainers, being engaged in perpetrating a deliberate fraud upon the public, cannot be listened to when they apply to a Court of justice for protection."

R. B.

## Reviews.

[SHORT NOTICES DO NOT PRECLUDE REVIEWS AT GREATER LENGTH IN SUBSEQUENT ISSUES.]

*Encyclopædia of Local Government Law.* Vol. II, Betterment to District Council; Vol. III, Diversion of Highways to Housing of the Working Classes. Edited by J. SCHOLEFIELD. London: Butterworth & Co., 1906.

The first of these volumes contains nearly forty subjects of infinite variety, and ranging in length from under a page to nearly 100. The most important, at any rate in length, is the article on Burial and Cremation, by Mr. Sydney Davey, which divides the subject into the three heads of Burial Grounds under the Burial Acts, Cemeteries under the Public Health Acts, and Crematoria. The most prolific contributor is Mr. G. R. Hill, who is solely responsible for fifteen articles, and co-operates with the Editor in another, namely: Diseases, Notification and Prevention of. The Editor furnishes articles on Census; Cities, Creation of; Combination of Authorities; Conferences; Counsel, Employment of; County Buildings; Criminal Liabilities of Corporations and Defaulting Authorities. Mr. F. M. Wheatley contributes two: County Councils, and District Councils; and among the other contributors are, Messrs. R. G. Ellis, E. M. Konstam and G. S. Robertson. It is worth noticing the Editor's reply to a comment that has been made as to the doubtful value of an encyclopædia of Local Government law. He admits that wherever practicable a lawyer ought to study for himself the relevant statutes, etc., and goes on to point out that the object of his present work is "in the first place to supply persons, who have neither time nor opportunity for deep original research, with a concise and reliable statement of the law enabling them to deal with the plain cases, which continually recur in, and form the bulk of an ordinary practice; and in the second place to provide for those who have a library at their disposal, and have complicated cases to consider, an index and a guide, helping them to turn their attention without loss of time in the required direction, and safeguarding them as far as possible against the very real danger of overlooking some relevant decision, regulation or statute." Some of the articles, for instance those on Burial and Cremation, and Bye-laws and Regulations, have useful bibliographies appended, and there are several references to the *Encyclopædia of Forms and Precedents*.

The third volume contains only twenty articles. By far the longest of these is the important one on Highways and Bridges, by Mr. G. E. C. Yarborough, which runs to over 130 pages. The subject is treated under three principal headings—Highways, Railways in their relation to Highways, Bridges. Mr. G. R. Hill again heads the list of contributors, this time with seven articles. The only article from the Editor is the one on Extraordinary Traffic and Excessive Weight. Several of the articles deal with new legislation of an important character. The most recent legislation is, perhaps, the Unemployed Workmen Act 1905, which is dealt with by Mr. H. T. Comyns, who, at the end of his article, gives some interesting figures relating to the number of applications and cases assisted under the Act. Mr. E. M. Konstam, in his article on Factories, Workshops, Bakehouses and Laundries, deals mainly, so far as statute law is concerned, with the Factory and Workshop Act 1901, though of course he cites the numerous cases decided under the former Factory Acts which are relevant to explain that Act. Mr. Konstam calls attention to a somewhat remarkable omission in the Act, *i. e.*, that there should be no special provision affecting laundries with regard to infectious disease. An article well worth the attention of local authorities is that on Falsification of Accounts, by Mr. A. O. Hobbs, where will be found very valuable practical advice as to the numerous ingenious methods adopted by fraudulent rate collectors to hide their malpractices, and the best manner in which to prevent and discover such frauds. Other important articles are those on Electric Lighting, and Housing of the Working Classes, by Mr. G. S. Robertson and Mr. J. W. Baines respectively.

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*Restrictive Railway Legislation.* By H. S. HAINES. New York: The Macmillan Company. London: Macmillan & Co. 1905.

This book strikes us as one which should be of real value to all those interested in American railways, as well as to many who are interested in English railways. Mr. Haines describes the construction of railways in America, and how the methods pursued soon diverged from those of England in accordance with the different circumstances of the two countries. The account of how the country became covered with lines is, however, difficult for an Englishman to follow without the aid of a good railway map. We have an account of the financial management of the railways and the

various plans adopted to get control of other lines. Mr. Haines, though not in most respects an admirer of English railways, strongly prefers their system of debentures to the American one of *mortgage loans*. He describes vividly the parlous position of the unfortunate creditors and shareholders who, in consequence of the foreclosure of numerous lines after the railway mania, found their properties all in the hands of receivers, whose peculiar powers and proceedings are fully described. We read how wild competition led to combination, and of the efforts of the legislatures to prevent the latter in order to keep up competition, culminating in the prohibition of pooling agreements. The railway companies fought a desperate battle, and resorted to many ingenious devices to get round the adverse legislation, but were defeated by narrow margins in the Courts. We think Mr. Haines' sympathy as to this part of the campaign is with the companies. The rest of the book deals mainly with the question of rates, a very difficult and complicated subject too. It is fully and elaborately dealt with, but requires rather special knowledge to follow clearly. We should like to call attention to the interesting account of the manner in which that astute nation, Japan, grants concessions for railways; and the fair criticism of the English method of dividing dividends up to the hilt and charging improvements to capital account. A careful perusal of this work will enable the reader to clearly understand the litigation against the Northern Securities Company and other such actions now pending in the United States.

**Second Edition.** *Principles of Commercial Law.* By J. HURST. London: Stevens & Haynes. 1906.

The first edition of this work was written by Lord Robert Cecil and Mr. Hurst, and they for some years postponed the publication of a second edition in the hope of being able to include legislation on Marine Insurance, and possibly Corrupt Practices. This expectation not being realised, Mr. Hurst has brought out the present edition, having been deprived of the co-operation of Lord Robert Cecil except for the revision and writing up of the chapter on Contract. We are always rather doubtful of the utility of books of "principles," except to students. We admit that in all carefully composed works, such as the one before us, much information will be found which may be of use to any practitioner, but if he has to get up the law of, say, Fire Insurance, or Companies, he will not



refer to this book or any one of its class, but will go to one of the authoritative and exhaustive works on the subject. As there is no definition of "Commercial Law" given, we can best give an idea of the scope of Mr. Hurst's book by mentioning the headings of the various chapters. These are: Contract in General; Principal and Agent; Companies; Carriage by Land and Sea; Merchant Shipping; Guarantee; Marine Insurance; Fire Insurance; Life Insurance; Accident Insurance; Sale of Goods; Bills of Exchange, Cheques and Promissory Notes; Lien, Pledge, and other Chattel Securities; Partnership. The longest of these are the chapters on Marine Insurance and Bills of Exchange, etc., which contain 45 and 48 pages respectively. The text of the Sale of Goods Act 1894 has been substituted for the statement of the law on that subject contained in the former edition, and the chapter on Bills of Exchange, etc., is mainly composed of the Bills of Exchange Act 1882; and the plan has been adopted "of first quoting each section of the Act and then adding such remarks as may seem useful, as well as references to some of the cases decided before and since the Act." We have examined the book with some care, and found the law very carefully and accurately laid down.

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**Fifth Edition.** *Leake on Contracts.* By A. E. RANDALL. London: Stevens & Sons. 1906.

There is no better book on Contracts than Leake, if, indeed, there be one so good. The last edition was published in 1902, and the number of new cases since then justify a new edition. We have not noticed any very material alterations, but are glad to see that there is now a table of statutes, and that shows the rather remarkable fact that there has not been a single statute passed since 1900 to which the learned Author considers it necessary to refer. We hope that in the next issue the Editor will see his way to giving the dates of all the cases. It involves, we know, a great deal of labour, but is often of great assistance, and is a practice which we are glad to say is on the increase. We notice that in this edition the cases as to "coronation seats" are included, but we think their effect is rather too shortly summarised, as the points of distinction are not very easy to grasp. The expression Mr. Randall uses as to parties contracting "on the footing that the procession or review would take place" does not seem to us explanatory enough. We should have thought that every contract was made on such a footing.

**Fifth Edition.** *Bunyon's Law of Fire Insurance.* By R. J. QUIN, LL.B., and F. E. COLENZO, M.A. London: C. & E. Layton. 1906.

Thirteen years have elapsed since the issue of the fourth edition of this work, and Mr. Colenso, who was then Editor, has now the assistance of Mr. Quin. The scheme and main body of the work have remained the same as that of the last edition revised by the Author, but of necessity, alterations, additions, and omissions have had to be made. The work is a very full and exhaustive treatise on the law of Fire Insurance. Nowhere is the most important principle that a contract of Fire Insurance is one of *indemnity* more thoroughly grasped and more persistently dwelt upon. The cases are most carefully examined, and ample quotations given from the important judgments. One feature of the book is the numerous references to American and Colonial cases. Some lawyers object to this, as the cases are not authorities, and even if they were it would be difficult, if not impossible, for English lawyers to know the weight fairly attributable to the different foreign Courts. We think, however, that they are often of great assistance in giving the arguments and opinions of able and learned lawyers on points which have not been decided here. Another feature of importance is the practical familiarity with insurance that appears in this work. No one can read the discussion of the subject of "Contribution between Co-Insurers" without remarking this and feeling how necessary such a familiarity is to understand so complicated a subject. Liability for injury to a neighbour's property arising from the spreading of a fire caused on a man's premises, by his own or his servant's negligence, is carefully discussed, and attention is called to the French law of *voisinage*. The risks under that law are very numerous and include the liability of contractor and architect for ten years, for faults of construction. Anybody who reads the account here will agree with the Author that it is "a complex and uncertain system." A very useful chapter is that on Statutory Regulations relating to Buildings and Fires, including the London Building Acts, and the Factory and Workshop Act 1901. In the chapter on Insurance of Church Property, there is a severe criticism of the unfair position of incumbents under the Ecclesiastical Dilapidations Act 1871, in which the Author says, after referring to a report of the Secretary to the governors of Queen Anne's Bounty:—"It thus appears that the Act is ambiguous and unintelligible even

to those who consider themselves the guardians of its provisions. By others it may be thought both oppressive and unnecessary." We do not notice any reference either to the insurance of motors, or to how far the establishment of a garage at a private house may affect the validity of the insurance. An omission we have noticed is that, although the liability of railway companies for fires caused by sparks from their engines is considered at some length, no reference is made to the recent Railway Fires Act 1905.

**Tenth Edition.** *The Elements of Jurisprudence.* By T. E. HOLLAND, K.C., D.C.L. Oxford: The Clarendon Press. 1906.

A fresh edition of Professor Holland's masterly treatise is always welcome: it possesses more than an European reputation, and references to it are found in every book that treats of the principles of law. The last edition was published in 1900, and, as may be expected, the learned Author has made some alterations and additions and cited some of the new cases, as well as the addition here and there of older cases in amplification of some proposition. Two of such that we noticed were the *Mayor of Bradford v. Pickles* and *Harrison v. Duke of Rutland*. The most important alterations we noticed in the text were the rule now laid down of the effect of *Allen v. Flood* as explained away in part by *Quinn v. Leatham*; a re-arrangement and development of the paragraphs which treated the manner in which continental nations "early ignored the narrow definition of *causa*, and the distinction between *contractus* and *nuda pacta*, which they found in the writings of the Roman lawyers;" an addition to the events "excusing performance" in the shape of "a failure in the occurrence of the event with reference to which the contract was entered into." Some of the important recent cases now cited are *The Winkfield*; *Cowley v. Cowley*; *Walter v. Lane*; *Colls v. Home and Colonial Stores*; and *West Rand Central Gold Mining Co. v. The King*. Some of the statutes, references to which are added, are the Married Women's Property Act 1893; Money Lenders Act 1900, and Trades Mark Act 1905. In some of the notes there are instructive references to the Hague Conferences and treaties resulting therefrom. It may show the wide range of authorities on which Professor Holland has drawn when we mention that we have noticed references to Sophocles' *Antigone*; Browning's *Ring and the Book*; and Count Tolstoy.

**Eleventh Edition.** *The Law of Contract.* By Sir W. R. ANSON, Bart., D.C.L. Oxford: The Clarendon Press. 1906.

This work is too well known and too widely read to require any description or review by us. We might, however, point out that it is little more than three years since the issue of the last edition, and that even in that time a number of cases have been decided which the Author has now cited. Several of these are of considerable importance, such as *South Wales Miners' Federation v. Glamorgan Coal Co.*; *Paquin v. Beauclerk*; *Carringtons, Ltd. v. Smith*; *Brandts v. Dunlop Rubber Co.*, and *Ogdens, Ltd. v. Nelson*. It is interesting to note Sir William Anson's criticism of *Krell v. Henry* and *Chandler v. Webster*; and we quite agree with him that these cases are difficult to reconcile with authority, and that "it is possible that the law may be regarded as not finally settled."

**Seventeenth Edition.** *Paterson's Licensing Acts.* By W. W. MACKENZIE, M.A. London: Butterworth & Co. 1906.

The last edition of this well-known work was only published a year before the issue of this one, but as the reason given for the necessity of a new edition is the favourable reception of the sixteenth one, we think we may fairly assume that the latter has been sold out. Another reason may be "the undiminished vigour" with which legislation on the subject is proceeding. A large number of cases decided in 1905 have been included in the present issue. The law, and still more the procedure, of Licensing, is full of pitfalls for the unwary, and Mr. Mackenzie's work is sure to prove of the greatest utility to the puzzled practitioner, tested, as it has been, for so many years. The newest subject of interest connected with Licensing is Compensation; and all that has been decided on this important point will be found here. The most important cases seem to be *R. v. Tolhurst*; *R. v. Cox*; *R. v. Drinkwater (1) and (2)*, and *R. v. Drinkwater, ex parte Conway*. A valuable addition is the Memorandum of Commissioners of Inland Revenue, explaining the principles upon which they have proceeded in determining the amounts of compensation payable on non-renewal of licences, and dated December, 1905. Valuable information is given on another point in a letter from the Home Secretary to the Bishop of Croydon, dated February 11th, 1905, explaining the true effect of the decision in *Commissioner of Police v. Donovan*.

*Ancient Law.* By Sir H. S. MAINE, K.C.S.I.

*Introduction and Notes to Maine's "Ancient Law."* By Sir F. POLLOCK, Bart., LL.D., D.C.L. London: John Murray. 1906.—We do not know how many editions this great classic has now reached. The book was first published in 1861, with this preface: "The chief object of the following pages is to indicate some of the earliest ideas of mankind as they are reflected in ancient law, and to point out the relation of those ideas to modern thought." This, indeed, was a modest introduction to a work for which Sir F. Pollock claims that it "did nothing less than create the natural history of law." We need hardly say that Sir F. Pollock's Notes are masterly, and the Introduction most interesting. The edition is admirably printed and produced, and should find a place in many libraries. The Introduction and Notes are also published as a separate volume, as indicated above.

*Life in the Law.* By J. G. WITT, K.C. London: T. Werner Laurie. 1906.—The late Mr. Witt was a man of very shrewd common-sense, and of decided, if not subtle, humour. This book of reminiscences will bring his personality to the remembrance of many readers. There are stories to make one laugh; and there are wise criticisms of the way in which things are done in England. His criticism of the "examination" for call to the Bar is convincing. We have hitherto failed to see that this examination fulfils any useful purpose. His observations upon bankruptcy law, company law, the law of workmen's compensation, and kindred subjects, are well worthy of attention. He disbelieved in grandmotherly legislation: and apparently most legislation appeared to him to be of this description.

*The Spirit of our Laws.* London: Sweet & Maxwell. 1906.—This is a popular account of English law, written, not for practical purposes, but to give the reader the means of taking an intelligent interest in the subject. It may prove useful for this purpose.

*Hints for Forensic Practice.* By T. F. C. DEMAREST. New York: The Banks Law Publishing Co. 1906.—The most important part of this little book deals with the decision of the Court of Appeals in New York in *Hamilton v. N. Y. C. R. R. Co.* (51 N. Y. 100). The effect of the decision is summed up by the Author as follows:—"In a jury cause, where evidence manifestly irrelevant, *i. e.*, such as ought to have no effect whatever on the case, is offered, the opposing party can safely sit silent, and afterwards move, as a matter of right, for a direction to the jury to disregard it." It is not a principle which we could commend with any confidence as affording a *rule of practice* for an advocate in England in the twentieth century.

*The Students' Handbook of Local Government Law.* By J. W. THATCHER. London: Charles Taylor. 1906.—The Author is one of the lecturers appointed by the Education Committee of the London County Council, and this little book appears to be worthy of his position. He deals succinctly with the creation of the Local Authority, with its duties, with rating and borrowing, with some further duties—such, for instance, as those connected with tramways, light railways, electric lighting and so forth—and with the auditing of accounts.

*History of Roman Private Law. Part I. Sources.* By E. C. CLARK, LL.D. Cambridge: The University Press. 1906.—Mr. Clark in his Preface says that he has been led to write the book under review from being convinced that the treatment of Roman Private Law, in its process of historical development, had not been distinctly dealt with in so satisfactory a manner as the results of "Classical Jurisprudence," and the Imperial legislation ending with Justinian. Taking Ihering as an instance, Mr. Clark speaks of that distinguished scholar's work as "a generalisation of the Spirit of Roman Law, or of the Roman people in their law-making capacity *as a whole*," and considers that such treatment "frequently and unavoidably co-ordinates views and principles separated by lapses of time inconsistent with any traceable sequence." This sequence he thinks essential, and from this point of view the present book has been written. It can hardly fail to be of use to students of Roman law, although it can scarcely serve any but an educational purpose. The Author has clearly devoted much time and labour to his subject. The sources of Roman law are dealt with from the *Senatus Consultum de Bacanalibus* of 186 B. C., to Hermogenianus, the last of the cited jurists. The book concludes with a Chronological Table.

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*The Law relating to Advertisements.* By T. A. JONES. London: Butterworth & Co. 1906.—In these days every department of life has its legal aspect and its legal hand-book; and we can well believe that there may be a demand for one such as that before us. Advertisement plays a large part in daily existence, and to the many advertisement contractors and others concerned in advertising the book should be useful. The Author appears to have collected most of the law affecting the subject: the law of Contract as bearing on advertisements; Agency and Commission; Illegal Advertisements; Copyright; all these are completely dealt with. In the Preface we are told that the book has been "somewhat hurriedly compiled during *odd intervals* of practice!"

*The Annual Digest, 1905.* By JOHN MEWS. London: Sweet & Maxwell. 1906.—If there be any one who doubts the reality of the work done by the Legislature and the Law Courts, a glance at the volume above mentioned must convince him. It is but the record of a single year, yet the number of statutes and important decisions contained in it is enormous. All the notable cases of the year are included, amongst others, *South Wales Miners' Federation v. Glamorgan Coal Co.*; *Yorkshire Miners' Association v. Howden*, and a number of important Local Government decisions. The work is as admirably done and as invaluable as ever.

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*The Law of Partnership. Second Edition.* By A. UNDERHILL, M.A., LL.D. London: Butterworth & Co. 1906.—The Author quotes the observation of Lord Macnaghten, that it is one thing to put a case in a nutshell and another to keep it there. He is speaking of the definition of partnership in the Act of 1890; but it is typical of the whole subject. The code, like all codes in English law, expresses the main principles: but the principles require elucidation and illustration, and the amount of such elucidation and illustration necessary for the purposes of a law student are well gauged by the Author of this book.

## CONTEMPORARY FOREIGN LITERATURE.

*Annuaire de la Législation du Travail.* Brussels: 1906.

A valuable synopsis of labour legislation in 1905.\* The United Kingdom and the Colonies and dependencies fill 216 out of 584 pages. The most curious title is that of the Massachusetts Act, 1905, c. 238, "An Act more effectually to prevent the existence of sweat shops."

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*Il Delitto Civile.* By G. BRUNETTI, Professor in the School of Jurisprudence, Florence. Florence: 1906.

This is a commentary on §1382 of the Code Civil and similar sections in the German and Italian Codes. It is worthy of notice that some of the newer schools of Continental jurists are in favour of something very like the *noxæ deditio* of pre-Justinian practice. An expansion of the views propounded in Spencer's *Prison Ethics* leads to the—probably impracticable—theory that the tort-feasor should work out the compensation due from him, either in prison or under the supervision of the injured party. The alternative is modern; in primitive law no one but the injured party was the taskmaster.

*Su la Teoria del Contratto Sociale.* By G. DEL VECCHIO, Professor in the University of Ferrara. Bologna: 1906.

The point of the argument of this beautifully printed book is the relation of Rousseau's work, published in 1762, to the French and American Declarations of Rights. Between the views that such documents were directly based on Rousseau, and that there was no intentional copying at all, Professor del Vecchio holds an intermediate position. He is inclined to think that the direct influence has been exaggerated, but that some of the official declarations of the "principles of 1789" bear distinct traces of the philosophical influence, especially those of Virginia (1776) and of the French Republic (1789). The book is well worth reading, as tending to throw additional light on a theory which has had political effects far out of proportion to its philosophical value. English and American authorities are freely cited, but one misses the likely name of Alexander Hamilton.

*Funerali.* By M. RICCA-BARBERIS. Milan: 1906.

The author, a *libero docente* in the University of Turin, gives a very complete account of the law of various countries as to burial from the privileged *actio funeralis* downwards. Nothing seems to be said about cremation. At p. 106 is an interesting account of the old canonist *jus funerandi* vested in the priest of the deceased's parish. The right was also called *stola nera*—at any rate in Italy—and meant that in most cases, if the burial were extra-parochial, the usual funeral dues and a fine of one-fourth of them in addition (*portio canonica* or *quarta funeralis*) were claimable by the priest of the proper parish.

## PERIODICALS.

*Deutsche Juristen-Zeitung.* 1 July—1 Oct. Berlin: 1906.

In a curious article on change of name Paul Bourget's *André Cornelis* is used in argument. It is with reference to a decision that if X. goes to live in New York, and there pursuant to the requisite legal formalities changes his name to Y., he will be recognized as Y. in Germany (p. 735). At p. 948 is an abstract of Dr. Adickes' proposal for raising the salaries of the Bavarian judges, a very modest one to English ideas, as 6,000 marks is to be the superior limit. The salaries must always be low, as Dr. Hamm's article thinks (p. 1051), on account of their extraordinary and unnecessary number. He contrasts England with 260 with Germany and its 8,700. Of course much of the work done by salaried judges there is disposed of here by lay magistrates. But even allowing for this, there is a huge discrepancy. The numbers practising are the other way, 20,000 in England, 8,000 in Germany. The figures are Dr. Hamm's.

*La Giustizia Penale.* 21 June—20 Sept. Rome: 1906.

Can a person be convicted of perjury for swearing what is impossible, in this case that a document was an *antichresis* when there are not two parties? Yes, said the Corte della Cassazione, for the *motivazione*—a familiar Italian juristic term for which we have no equivalent—is the consciousness of falsehood, not the legal value of falsehood (p. 978). The special laws regulating Sardinia are the subject of numerous decisions. The terms *abigeato* and *pascolo*



*abusivo* suggest the crimes most usual in a pastoral community. Roman law inflicted considerably heavier penalties on *abigei*, death in some cases. For those interested in Italian antiquities, the prosecution of Stephano Bardini is instructive (p. 1306). He was acquitted at Florence, under the law of 1902, of repairing the Torre del Gallo without obtaining the consent of the Minister of Public Instruction. His defence was that the building was not included in the official catalogue of historic monuments. This was regarded by the higher tribunal as insufficient, and there was a *renvoi* of the case to Florence.

JAMES WILLIAMS.

Books received, reviews of which have been held over owing to pressure on space:—Wilcox's *The Foibles of the Bench* (The Boston Book Co.); *Selden Society's Publications*, Vol. 21; *Encyclopedia of the Laws of England*, Vol. 1; Henderson's *Digest of Cases in Law Journal Reports*; *Railway and Canal Traffic Cases*, Vol. XII; Moore's *Act of State in English Law*; Tarring's *Law relating to the Colonies*; Eversley's *Law of Domestic Relations*; Elphinstone's *Introduction to Conveyancing*; Powles and Oakley on *Probate*; Brown's *The Austinian Theory of Law*; Rogers on *Elections*; Odgers' *Pleading and Practice*; Crosse's *Authority in the Church of England*; Bernard's *First Year of Roman Law*; *Annual Practice*; *A. B. C. Guide to Practice*; Bendix's *Fahnenflucht und Verletzung der Wehrpflicht durch Auswanderung*; Banning's *Limitation of Actions*; Indermaur's *Manual of Equity*; *Yearly Practice of the Supreme Court*; *Addison on Torts*; *Tristram and Cooté's Probate Practice*.

'Other publications received:—*Table A, The Companies Acts, 1862—1900* (Jordan & Sons); *Reports of the American Bar Association*, Vol. 28; *Index—Vols. I—VII, Encyclopedia of Forms and Precedents*; *Catalogue of Gray's Inn Library* (Witherby & Co.); Poland and Cohen's *The Criminal Appeal Bill*; Atkinson's *Golden Rules of Medical Evidence*; *The Lawyers' Remembrancer*; Hirst's *Commerce and Prosperity* (Macmillan & Co.).

The *Law Magazine and Review* receives or exchanges with the following amongst other publications:—*Juridical Review*, *Law Times*, *Law Journal*, *Justice of the Peace*, *Law Quarterly Review*, *Irish Law Times*, *Australian Law Times*, *Speaker*, *Canada Law Journal*, *Canada Law Times*, *Chicago Legal News*, *American Law Review*, *American Law Register*, *Harvard Law Review*, *Case and Comment*, *Green Bag*, *Madras Law Journal*, *Calcutta Weekly Notes*, *Law Notes*, *Law Students' Journal*, *Bombay Law Reporter*, *Medico-Legal Journal*, *Indian Review*, *Kathiawar Law Reports*, *The Lawyer (India)*, *South African Law Journal*.



THE  
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I.—IMPRISONMENT FOR DEBT.

FOR more than a generation it has been a common saying that imprisonment for debt is abolished, yet, in truth, there are more debtors consigned to gaol at the present time than there were in the days of John Howard. During the year 1903, no fewer than 17,598 persons<sup>1</sup> were incarcerated in English prisons for debt or on civil process. This figure relates to the number of men and women actually received in gaol during that year: the number of committals, and, indeed, the number of arrests would, of course, be enormously greater. Of this huge total 10,544 were debtors for small sums, sent on commitment from the County Courts at the suit of private creditors, but housed and fed in prison, be it remembered, at the cost of the public. Now, in the number of such prisoners there has, of late, been a marked increase. The governor of one large gaol (Wakefield) reported in 1903 an increase of *one hundred and sixty* per cent. over the committals of ten years ago; and, during the last four years for which statistics are available, the rate of increase throughout the whole country has been strangely disquieting, for it amounts in that period to more than forty per cent. In view of these remarkable figures, it may be useful to offer some general reflections on a subject so closely related to the social and commercial well-being of

<sup>1</sup> For the year ending March 1905 the number was 19,830.

the community, and in particular affecting those orders of society which are least able to protect themselves against oppression or an undue straining of the law.

A wise man of old, as Bacon reminds us, was wont to say: "The laws are like cobwebs; the small flies are caught but the great break through." And, at the present day, if a man's debts are heavy enough and he can raise ten pounds for fees, he may claim the privileges and immunities of the Bankruptcy Court, and need no longer fear the touch of a bailiff's hand.

The nineteenth century saw mighty changes as well in the circumstances as in the duration of imprisonment, whether on criminal or on civil process: it is, in fact, not easy for men of our time to realise even such vivid pictures as those of the Dorrit family reared within the precincts of the Marshalsea, and of Mr. Pickwick incarcerated in the Fleet, that "hideous grave," as Dickens calls it. More than thirty years after Howard had, in Lecky's phrase, died a martyr to the cause of Prison Reform, the conditions that prevailed were still horrible. Groups of debtors might be seen sitting idle and listless in some gloomy den, or pacing day by day and year by year small damp and filthy courtyards. In many gaols, the unfortunate wretches were crowded together at nightfall in a cold, dismal vault, without fire or light, sometimes without a window or any form of ventilation other than the door. No provision was made for the case of sickness, relief being found only in death: showing, as Howard justly observed, how full of meaning was the curse of a severe creditor who pronounced his debtor's doom "to rot in gaol."

"Men and women debtors had nothing but the dirty boards to sleep upon. No bedding, nor even straw allowed. No fire even in this cold, damp season. No medical attendance in sickness. Neither mops, brooms, nor pails are allowed to keep the prison clean. Soap and towels are not

afforded to the prisoner." Thus, on the 11th December, 1804, wrote James Neild, a Buckinghamshire magistrate of high repute, to the Right Honourable Peter Perchard, then Lord Mayor of London: his description applied to one of the City prisons within the jurisdiction of the Lord Mayor and his Court of Aldermen. But, so far from securing any attention at his lordship's hands, not even the courtesy of an acknowledgment was accorded to Mr. Neild's letter.

In 1818, Joseph Gurney of Norwich visited a large number of prisons, in company with his sister Elizabeth Fry, and pronounced the case of the debtors to be "sometimes exceedingly afflicting": their situation was, he declared, often worse than that of the criminals themselves by reason of "the extreme smallness of their jail allowances." Even though the debtor's friends were to succeed in satisfying all the demands of creditors, he might, in some prisons, be detained for life unless he could also meet the exactions of turnkeys, and pay the fees claimed by under-sheriffs and other officials for his "liberate." Work in every form was forbidden to the wretched man, while, under the rules of Birmingham Court prison, the keeper actually became liable to discharge the debt and costs should he allow a prisoner to engage in any profitable occupation.

In many places Gurney found the debtors, men and women, sharing the accommodation of the gaol in common with untried prisoners and convicted felons—a motley crowd, gaming, swearing, and singing licentious songs, amidst a scene of riot and confusion such as Goldsmith has depicted in the *Vicar of Wakefield*. These vicious and miserable surroundings, as we may well suppose, rapidly produced marked moral and physical deterioration: the good soon learned how to become bad, the bad how to become worse:—

"The vilest deeds, like poison weeds,  
Bloom well in prison air—  
It is only what is good in man  
That wastes and withers there."

There was, it is true, a rude application of the principle *cessio bonorum* by the operation of confused and complex Bankruptcy laws, imperfect and ill-administered; but the application of this principle was rigidly confined to *traders*, on the ground, so Blackstone informs us, that "the Law" held it to be an "unjustifiable practice" for any person other than an *actual trader* to encumber himself with any considerable debts: "If a gentleman, or one in a liberal profession, at the time of contracting his debts, has a sufficient fund to pay them, the delay of payment is a species of dishonesty, and a temporary injustice to his creditor: and if at such times he has no sufficient fund, the dishonesty and injustice is the greater. He cannot, therefore, murmur if he suffers the punishment which he has voluntarily drawn upon himself." On such reasoning as this "the Law," speaking generally, condemned an insolvent debtor, whose fortunes had been reduced through no fault of his own, to imprisonment for the rest of his natural life, although he were willing to give up everything he had in the world for the satisfaction of debts, honestly contracted on terms agreeable to his creditors.

In Scotland, the doctrine of *cessio bonorum* was freely accepted, though even in that country debtors were, for a certain limited time, kept in "sure ward, firmance and captivity," in order—so an Act of Sederunt declared—that they might "by the *squalor carceris* be brought to pay their debts."

Not only were English debtors subject to life-long detention after final judgment had been obtained against them, they were also liable to be attached on mesne process: indeed, any man, unprotected by privilege, might be summarily arrested at the pleasure of another for an *alleged* debt of £20—until 1826, £10—consigned to gaol forthwith, and held to bail without any preliminary hearing. The affidavit preceding the warrant of arrest contained

no assurance of the creditor's belief that such arrest was necessary, nor even an averment that the amount owing exceeded any sum due *per contra*. This procedure is said to have had its origin in a shameful traffic practised by the Common law judges. The three great Courts in Westminster Hall had become so many rival shops fighting for custom and fees—says Bentham, mainly on the authority of Roger North, brother of Lord Keeper Guildford:—"the liberty of the defendant was the bonus each made itself master of, and offered as a lure to draw in purchasers." Whether the judges were in this matter quite so black as Bentham painted them is open to doubt, but it seems clear that the practice did arise out of an unseemly scramble for fees. It was the King's Bench that began the struggle by filching business from their brethren of the Common Pleas to whom ordinary actions of debt properly belonged. On the civil side, the King's Bench had cognisance only of actions relating to injuries savouring of a criminal nature, for which fines were, in strictness, payable to the Crown as well as damages to the plaintiff—such as actions for trespass committed *vi et armis*, or actions on the case alleging fraud. The judges of this Court sought, however, to amplify their jurisdiction by allowing a *fiction* accusation of trespass, and, when once the defendant was in Court, the plaintiff was permitted to waive the trespass and declare for a debt. Now, as the injuries in respect of which they had jurisdiction "savouring of crime," it was the practice of the King's Bench judges, without any preliminary summons, to attach the defendant and make him procure safe pledges or sureties; and so soon as the defendant found himself in the custody of the Marshal for the supposed trespass, he, being a prisoner of the Court, might be compelled to answer any other claim at the suit of any man. This procedure naturally commended itself to creditors, and grass seemed like to grow in the Common Pleas; but, immediately after

the Restoration, the judges, over whom Guildford presided, procured an Act for "discouraging causeless arrests," which required (except in small cases) the *true cause of action* to be "expressed particularly" in the body of the writ before any arrest could be made. Their brethren of the King's Bench were, however, equal to the occasion, and, under the guidance of Hale, invented the famous *ac etiam* clause by which the defendant was to be brought in to answer the plaintiff of a plea of trespass, *and also* to a bill of debt. A few years later the Common Bench met this stratagem for usurping jurisdiction by adopting a similar device; and so the struggle continued. Whatever be the true view of these and similar transactions, it is certain that the practice of arrest on mesne process obtained for a couple of centuries. Large sums were raised, in the form of charitable donations, to aid the poor debtors, and, at times, Parliament was driven to relieve the overflowing prisons\* by releasing some of the inmates on making surrender of their effects. For example, in 1809, an Act was passed which extended to debtors who owed no more than £2,000: by the same Act relief was also given to debtors for £3,000, who had been in custody for five years, and to debtors for any amount, who had been confined for sixteen years. Romilly was, at this period, busying himself to discover some more effective remedies for the existing evils, that is to say, some remedies which would have a chance of being accepted by the legislature. A beginning was made with a modest little measure for subjecting the freehold estates of deceased debtors to the payment of their simple contract debts, but Lord Ellenborough would have none of it: he is, indeed, reported to have denounced such "dangerous innovations" as tending to destroy the law of primogeniture and reduce all lands to gavelkind tenure. Fifteen years after Romilly's death, however, there would probably have been a fundamental alteration in the law had not the Attorney-General

lost his seat at the beginning of the Session of 1834: the Bill of that year proposed the abolition of imprisonment for debt whether on mesne process or in execution (confining such coercion to cases of fraud, gross negligence and contumacy), with, of course, full surrender of the whole of the debtor's property. This measure was founded on the excellent report of a powerful Common Law Commission consisting of Pollock, Starkie, Evans and Wightman.

An attempt had already been made in 1820 to give some form of permanent relief by the establishment of a Court which an insolvent debtor might petition for release and for the administration of his estate and effects; and, in the first year of the late Queen, this Court was placed on a more satisfactory basis, while, at the same time, arrest on mesne process was abolished except in cases where the defendant was likely to abscond. At last, in 1869, was passed the Act which purports to "abolish" imprisonment for debt, and does in fact, abolish arrest on mesne process, except in certain High Court cases where it can be shown that a defendant is about to leave the country, and that his absence would materially prejudice the plaintiff in the prosecution of his action. The Act provides as follows:—

*Sect. 4.*—With the exceptions hereinafter mentioned no person shall, after the commencement of this Act, be arrested or imprisoned for making default in payment of a sum of money. (Then follow certain exceptions as to payment of penalties, etc.)

*Sect. 5.*—Subject to the provisions hereinafter mentioned and to the prescribed rules, any Court may commit to prison for a term not exceeding six weeks, or until payment of the sum due, any person who makes default in payment of any debt or instalment of any debt due from him in pursuance of any order or judgment of that or any other competent Court.

Provided—

(1) (As to the mode of exercising jurisdiction.)

(2) That such jurisdiction shall only be exercised when it is proved to the satisfaction of the Court that the person making default either has, or has had, since the date of the order or judgment, the means to pay the sum in respect of which he has made default, and has refused or neglected, or refuses or neglects, to pay the same.



Imprisonment, under this statute, does not operate as a satisfaction or extinguishment of the debt, nor deprive the creditor of his right to take out execution against the debtor's effects; but it will be seen that the term of confinement cannot now-a-days exceed six weeks. The Act, however, had not been long in force before the Courts discovered that a direction for payment of a judgment debt by instalments amounts to a separate order for each instalment, so that there may be as many committals as there are instalments to be paid. If, *e.g.*, the judgment were for £10 forthwith, the defendant could not be imprisoned for a longer term than six weeks; but if the order were for £10 by bi-monthly instalments of £2, he would be exposed to a series of imprisonments, amounting in the aggregate to thirty weeks. No doubt, on the hearing of a judgment summons, alleging default in the payment of instalments, the judge may make an entirely fresh order for payment, either at a specified time or by instalments; or he may commit in respect of the arrears and suspend the execution of the warrant to enable the debtor to discharge the amount by instalments or otherwise. But it is essential to bear in mind that the jurisdiction to commit on any terms whatsoever is based on *wilful default*—that is to say, on proof that the debtor has deliberately withheld payment when the means of making it were in his power. It is not permissible to say: "Oh! whether the man has had the means or not, he is now earning good wages—I will, therefore, commit him, but suspend the warrant to enable him to pay at his convenience."

Lord Herschell made this point abundantly clear: "A judge would very much neglect his duty if, in order to save himself the trouble of inquiring whether there was default, and whether the man had possessed means of making payment of the instalments, down to the time ordered, he were to issue a warrant of commitment with a stipulation for

suspension if some smaller sums were paid, without having really arrived at the conclusion that there had been default. I think that would be a most irregular and improper proceeding."<sup>1</sup>

It is, then, manifest that the issue of a warrant cannot possibly be justified unless it has been proved affirmatively, not that the debtor will certainly be able to pay if time be granted him, but that he has, since the date of the judgment order, made wilful default by withholding payment of the sum due under it. It must be conceded that there is on record a confident *obiter dictum* by Lord Esher which tends to limit this proposition: "If the debtor neglects to pay *any part of the sum* which he is able to pay he makes default in obeying the order, and the Court has jurisdiction under Sect. 5."<sup>2</sup> Fry, L.J., did not think it necessary to express any opinion on the point; and, indeed, it is difficult to conceive a case in which the debtor could not, by hook or by crook, have raised a single sixpence towards the discharge of his obligation. In a later judgment, Romer, L.J., seems to suggest that there may possibly be some *via media*: "It cannot be gathered from the affidavit that the business is profitable, or that the defendant has means to enable him to pay a *substantial part of the judgment debt, subject to the obligation he is under to support his wife and family.*"<sup>3</sup>

It may well be that the learned Lord Justice did not intend to lay down any general rule as to the sufficiency of the evidence necessary to support a commitment, and the words of the statute, certainly, seem to import the existence of means to pay the whole of the judgment debt or of the particular instalments already due. The consequences apprehended by Lord Esher from this construction can be, and are daily, obviated by the practice of directing payment

<sup>1</sup> *Stonor v. Fowle* (13 App. Ca., at p. 30).

<sup>2</sup> *Ex parte Fryer* (17 Q. B. D. 718).

<sup>3</sup> *McIntosh v. Simpkins* (L. R. [1901], 1 Q. B. 487).

only of such instalments as seem suited to the supposed means of the judgment debtor. However, whether his lordship's dictum be accepted or no, it is plain that there can lawfully be no committal unless there has been something in the nature of *dishonesty*. "I think," said Lord Bramwell, "it is important to bear in mind that an adjudication of committal ought only to take place where there has been a wilful default in payment, because in truth, this power of committal is not an imprisonment for debt, it is an imprisonment for *past dishonesty*, together with the prospect of the plaintiff getting his money."<sup>1</sup> Lord Bramwell refers, of course, to dishonesty *subsequent* to the date of the judgment—not to fraud practised when the debt was originally contracted. Under former statutes such fraud did, indeed, justify commitment on non-payment of the judgment debt: but the Act of 1869 dealt with this matter independently, making it a substantive misdemeanour for any person (whether a bankrupt or not) to incur a debt or liability, if in so doing he obtains credit under false pretences or by means of any other fraud.

To justify a committal it is of course necessary that the debtor's means of payment should be strictly proved. The Court ought no doubt to take into account sources of income other than ordinary wages or earnings, as, for example, a purely voluntary allowance; but it is not sufficient—or rather it is not conclusive—to point to the debtor's occupation or style of living as establishing that he is in a position to make payment. Such evidence calls for an answer, but the man is entitled to show that, despite appearances, he cannot and could not pay the debt—his occupation, *e. g.*, may be, in fact, unprofitable, or he may be kept wholly by his wife.<sup>2</sup>

If, then, the Act of 1869 were administered in the spirit

<sup>1</sup> 13 App. Cas., at p. 28.

<sup>2</sup> *Charl v. Jervis* (9 Q. B. D. 178).

in which it was framed, and in the light of Lord Bramwell's exegesis, there would probably be little to complain of in our existing practice of imprisonment for debt, whether such imprisonment be regarded as punitive or as a mode of extracting money from the debtor and his friends. But in certain districts these principles have been to some extent departed from, or, at any rate, relaxed, to the detriment of a large section of the working classes, and of the more reputable traders who supply them with the necessities of life. It is perhaps idle in this connection to discuss the injustice of paying the judgment creditor in full, in preference to other equally deserving creditors; for, unless the debtor becomes bankrupt or can obtain an administration order, it would seem that his only choice is to adopt this course or go to gaol. But, at any rate, it is manifestly inequitable to pay the judgment creditor if, as a consequence of doing so, the debtor will be driven to purchase the necessities of life *on credit* without any reasonable expectation of being able to meet his new obligations. The strategy practised, by the way, in some places, after a commitment has been issued, is to lay hands on the man when he has his week's wages in his pocket, and let the matter stand over on securing these wages in part payment of the debt. The authors of the Act of 1869 can hardly have contemplated a system of robbing Peter to pay Paul, and, in considering whether the debtor has possessed the means of payment, regard should surely be had to nothing beyond the surplus remaining after making due allowance for reasonable family requirements. Moreover, the evidence of means is often as unsatisfactory as it is incomplete—statements, *e. g.*, by a debt collector that the man is in good work, and has been earning, say, twenty-five shillings a week. On closer inquiry it will frequently be found that, although twenty-five shillings a week may be the "standard" wage, the debtor has been only partially employed, that his

average has not been more than fifteen or sixteen shillings, and that he has a wife and young children wholly dependent upon his precarious earnings.

Again, if a man is to be punished for making *wilful* default in compliance with a judgment order, the primary and obviously essential fact to be established is that, during the period of the alleged default, he had notice or knowledge of the existence of the order. Now, in point of fact, the debtor frequently knows nothing whatsoever of the matter until he is served with the judgment summons, this being, in most cases, the first process of which *personal* service is required. Instances have, indeed, occurred where the wife has actually deceived the bailiffs as to her husband's identity, so that he has known nothing of the debt before the moment of arrest.

It has been suggested—and there is much to be said in favour of this proposal—that, if the debtor do not appear in person to answer the judgment summons, a warrant should issue to compel his appearance, as in the case of an information for an indictable offence. This process seems drastic, but it would, at least, ensure the debtor's presence during the inquiry as to means, and enable the Court to ascertain whether he has, in fact, had notice of the judgment order.

Under an expanding system of credit, articles of adornment are palmed off upon the wife by unscrupulous traders, and purchased by her without the husband's knowledge—or, perchance, wages handed over for rent and necessaries are wasted by her in gaming or drinking, or misapplied to the cash purchase of trinkets, leaving the butcher and the baker to sue for their bills. Soon afterwards comes the County Court summons, served on the wife, who destroys it or conceals it from her husband. The plaintiff gets judgment after giving little or no proof of the wife's agency, or, perhaps, she appears and admits the debt. Next comes

the judgment order under which a few instalments may possibly be paid—then, when default occurs, there arrives the judgment summons, followed by commitment and arrest.

It is hard enough that the defendant should be committed, if he knew nothing of the debt or of the original summons—it is plainly unjustifiable to commit him if he knew nothing of the judgment order, whatever may be his means and position at the hearing of the judgment summons.

The provisions of the Act of 1869 apply also to persons committed in Courts of summary jurisdiction for non-payment of civil debts, *e.g.*, sums due under orders obtained by Poor law guardians against parents, grand-parents or children, in respect of relief granted to poor relations unable to work. There are, too, included in the category of debtors, men arrested for arrears due under bastardy orders, or under orders in the nature of judicial separations. In these cases imprisonment serves to satisfy the demand, but, on the other hand, it follows on arrest *without any evidence of means*—a drastic procedure which may be justified on the ground that the original order is based on moral obliquity coupled with a natural obligation to afford support. The process, however, often operates harshly in bastardy cases, owing to the fact that the Court has no power to vary an order made, perhaps, many years before. By illness or accident the putative father may have been reduced to a state of penury; or, on the other hand, a trifling order may have been made upon a man who has, since its date, acceded to great wealth. Among this class of debtors are included, also, parents who owe money under orders for the maintenance of their children in industrial schools and similar institutions. Until 1902 these arrears were treated as “civil debts”; but, by a short sub-section slipped into the Youthful Offenders Act, 1901, they are now recovered as in bastardy—an enactment which has resulted in many cases of manifest injustice, as,

*e.g.*, where a man was arrested for six shillings arrears, with a further sum of six shillings and sixpence to pay for costs of warrant and commitment. His average wages for some months had been seven shillings a week, and he had seven young children to provide for; yet, as his furniture had all been sold to procure food, the authority were in a position to ask that he should be imprisoned forthwith. In some of these cases the order is for the maintenance of a truant child whose attendance at school the father has done his best to secure; in others it has been proved that the man had actually given the money weekly to his wife who had spent it on drink. In one of such instances the man was arrested, while in bed, for the non-payment of five shillings arrears which he had not the slightest reason to suppose to be due. No doubt these summary arrests, followed by commitments without any evidence of means, induce the payment of money—generally by persons who do not owe it, or by the sale of the last sticks of the debtor's furniture—but, while certain idle and contumacious persons are thus compelled to recognise their obligations, many innocent victims thereby suffer grievous wrong. "I'll tell you wot it is, sir," said Sam Weller to Mr. Pickwick in the Fleet, "Them as is always a idlin' in publichouses it don't damage at all, and them as is always a workin' when they can, it damages too much."

Some seven or eight years ago attention was directed to the increasing number of "debtor" prisoners, and it was contended that the number would be rapidly diminished if the character of the detention were made more rigorous. It seems to have been supposed that not a few men prefer imprisonment to parting with their money, and it was accordingly resolved to add to the discomfort of the debtors—or rather to enforce on civil process imprisonment of a nature hitherto unknown to our law. Under the old writ of *ca. sa.*, the sheriff was commanded to take the body of the

defendant in execution, and him safely to *keep in custody* till satisfaction were made for the debt and costs; but, under the Prison Rules of 1899, the debtor finds himself in worse case than a criminal of the first division—he is placed on prison fare and deprived of the right to supply his own food, he is forced to perform menial service, and he is compelled to labour. In each of these particulars he is now worse off than a criminal in the first division. During the earlier years of the working of the Act of 1869 a somewhat similar notion prevailed: it was thought that a solution of the difficulty had been obtained by committing debtors for the maximum term of six weeks. Lord Bramwell was told by a County Court judge that this really reduced the actual term, because under such an order “they moved heaven and earth to get their friends to pay.” But this simple device for compelling one man to pay the debt of another was quite ineffective, and the plan for treating debtors worse than criminals soon proved as great a failure. “It was anticipated,” wrote the Prison Commissioners in 1903, “that the more rigorous treatment of debtors when in prison, which was one of the results of the Prison Act, 1898, would have led to a smaller number of debtors coming to prison. So far, however, this expectation has not been fulfilled. But it is significant to note that out of 910 debtors who came to Birmingham Prison, only 15 per cent. served the full time in custody, which looks as if the increased rigour of imprisonment made them reluctant to stay longer than they could help.”

The expectation is, indeed, very far from fulfilment. The following figures require no comment:—The number of debtor prisoners received in 1897 was 10,391; in 1902, 12,841; in 1903, 14,454. From these figures are excluded men committed for bastardy or wife's maintenance arrears, because they were, prior to 1899, not treated or classed as “debtors.”



It is not very easy to guess the precise "significance" attached to the fact stated in the last sentence cited from the Commissioners' Report—especially as we have nothing in the nature of comparative statistics. It seems, however, to suggest that this quite intelligible reluctance "to stay longer than they could help" had induced the prisoners "to move heaven and earth to get their friends to pay," as under the *régime* of Lord Bramwell's friend, the County Court judge. But, in the absence of direct evidence to the contrary, it seems fair to suppose that, even without the "more rigorous treatment," these prisoners would have experienced some reluctance "to stay longer than they could help."

It has been remarked more than once that a debtor often finds himself in a worse plight than if he had stolen the articles for the price of which he is sued. With a good character he would probably have escaped imprisonment altogether under the First Offenders Act, while, if he were fined for the theft, with an alternative of imprisonment, he would be entitled during his confinement, on paying any part of the fine, to have the term of imprisonment reduced by a number of days bearing a direct proportion to the amount so paid in part satisfaction. The Act of 1899 confers no such right on an imprisoned debtor.

As may well be supposed, the consequences of incarceration are, in many cases, disastrous: gone indeed are the horrors of imprisonment for debt, but some of its worst evils are still with us. The wife and children are often forced to seek the shelter of the workhouse; or, to avert this dreaded calamity, the woman, in her husband's absence, chooses rather to become a wanton. Such has been the beginning of many a life of shame. On his release from custody, the man is rarely able to resume his old employment, and it is generally difficult for him to secure a fresh

engagement : his home is now broken up and his downfall is complete, while all this ruin has been brought about at the public charge, except in so far as the burden, in the shape of heavy Court fees, has fallen on the shoulders of the injured creditor.

To the aged and infirm, moreover, imprisonment proves peculiarly afflicting. We have seen a hale and hearty old man of eighty reduced, by six weeks of "the more rigorous treatment," to a state of mental and bodily collapse pitiable to behold. Two or three years before his arrest, he had lodged with a young newly-married couple. The husband died suddenly, and his youthful widow, overcome with grief, was quite helpless. The old lodger, in an evil hour for himself, gave directions to an undertaker, at whose suit he was held liable for the funeral expenses. Between the making of the judgment order and the date of committal the poor fellow had at last exhausted the savings of a lifetime, and so learned by bitter experience that imprisonment for debt is not yet abolished.

At the root of the whole mischief lies a vicious credit system, which must needs yield a rich crop of unsatisfied judgments, for it may be taken as certain that so long as credit can be got credit will be had. However stringent the conditions of detention, useless goods will be successfully foisted on the extravagant and unwary, while the reckless and improvident will ever have recourse to the advertising moneylender for loans which it is not within their power to repay.

Greater caution in the issue of warrants of commitment, more rigid adherence to the principles upon which the legislation of 1869 was based, would possibly operate, in great measure, to check undue extension of the credit system. It might perhaps be well also to amend in some respects the rules as to service of the earlier processes in actions for the recovery of small debts, making them

conform more closely to those prevailing in the High Court—or, at least, to provide for personal service of the judgment order a reasonable time before the issue of any judgment summons. Reference has already been made to the proposal for arresting a debtor who does not answer to the judgment summons.

Approaching the subject from a slightly different point of view, a County Court judge of great authority and experience (Sir R. Harington) recently condemned the present system of imprisonment as constituting a serious hindrance to thrift. It fosters—so his argument runs—a system of credit under which the tradesman is willing to sell goods “on tick,” because he knows that, however poor his debtor may be, “there must be almost always some monthly instalment which he can rely on forcing him to pay.” Nor will the learned judge allow that the existing system may be justified on the ground that any interference with it would prevent the deserving poor obtaining credit in times of distress. “It is obvious,” he writes, in a letter to the *Times*, “that the man who can pay four shillings or two shillings a month under the pressure either of a bare judgment or a warrant, could have paid ready money for his goods, and might, if he liked, have had his shillings or sixpences weekly for the savings bank into the bargain. But the mischievous facility for credit secured by this pledge of his body tempts him to run into debt.”

Now it must be confessed that it does not seem obvious, that, because a man can pay by instalments under a warrant of commitment, he could necessarily have paid ready money for the goods months before, at a time when he possibly was out of work; but the learned judge puts the matter on a broader and more satisfactory basis, for, appealing to a long experience, he says: “I believe that the man who was known to pay when he could would always be trusted.” If the poor were compelled, in ordinary

times, to pay ready money, it would, he thinks, be the best cure for their thriftless tendencies—in short he accounts imprisonment for debt a temptation to “thriftless extravagance,” because the debtor can, so to speak, “mortgage his body.”

The refusal of credit, during hard times, even if confined to the thriftless and extravagant, would, we are afraid, drive numbers into the workhouse; but, without advocating the complete abolition of imprisonment, may it not be that a modified system, coupled with more punctilious regard for the provisions of the statute—less laxity in the grant of committal orders—would in many cases incline the creditor, offered a “mortgage” of his debtor’s body, to say, “I like not the security;” and thus tend to lessen an evil which has of late made such rapid growth?

CHARLES M. ATKINSON.

## II.—THE CONSOLIDATION AND AMENDMENT OF THE POOR LAW STATUTES.

BY the courtesy of the Editor of the *Law Magazine and Review*, I am permitted to lay my views before its readers upon this momentous subject, and I propose to deal with it in three parts:—(1) Prefatory, (2) The Ulcer, and (3) The Prescription. By this sequent method I hope to achieve a logical exposition of the question.

*Prefatory.*—When one surveys the past history of these laws, one is struck with the singular and unqualified failure that has attended legislation, both in the long past and in recent years, to cope successfully with that hydra-headed monster, Pauperism. How much better the wastrel was understood in the time of Edward III, can be seen by the statute passed in that reign (1349), making it penal

to "give alms to a beggar able to work." Why the subject was not left there is beyond the scope of this article. Had our forefathers been gifted with "second sight," or with power to look into the future, they certainly would have spared their unfortunate descendants the legacy of woe which their misdirected legislative efforts have certainly left us.

As all men know, the origin of what is called "The English Poor Law" is referred to the 43rd Statute of Elizabeth. I take exception to two parts of this Act: (1) That work should be provided for the able-bodied poor; (2) That each parish should look after its own poor; and I will endeavour, later in this article, to give my reasons for so doing. Since the passing of this Act, we have ever been on the downward grade, till we come to the eventful year 1834, when the pace became very fast indeed. Since then Act after Act has been passed, until they amount to-day to the extraordinary number (excluding the 43rd Elizabeth, chap. 2) of one hundred and fifty legal enactments, to which bewildering chaos must be added the innumerable Orders issued by the Local Government Board, having the force of Acts of Parliament. Were it not that the result is so sad, so disastrous, so costly, in its effect upon the nation, it would read like a Gilbertian farce.

How to extricate something like order out of this truly chaotic condition in which we find "the Law" to-day, will be the aim of this article. I have neither the desire nor title, nor ability, to trespass upon the domain of those learned in these laws, therefore I am approaching the subject solely from the layman's standpoint. I say this, not to disarm criticism of my layman's efforts; indeed, I invite criticism; but it must be distinctly understood that it is from the lay Poor-law reformer's view that criticism of this paper must start and end. In concluding this

prefatory portion of my article, I would say that in December 1903, and again in August 1905, a circular letter anent this subject, urging the necessity of consolidating and amending the laws, was sent to each Member of the Houses of Lords and Commons, each Board of Guardians, County Council, and Municipality of England and Wales. A large number of affirmative replies were received, and Mr. H. R. Gawen Gogay, Ex-Guardian of St. Saviour's Union, S.E., being desirous of ascertaining how many resolutions in favour of the proposal had been sent to the Local Government Board, wrote to the President, and obtained a reply stating that the Board had received, since December 1903, two hundred and thirty-one representations in favour of consolidating and amending the Poor law statutes.

*The Ulcer.*—In the early years of the last century Pauperism had increased so greatly, so many and varied abuses had crept into the administration of the Poor laws, that it was deemed necessary to appoint a Royal Commission of Inquiry, and this was done in 1832. In their report, the Commissioners state that "the heads of settlement may be reduced and simplified; the expense of litigation may be diminished . . . less vexatious and irregular modes of rating may be established, systematic peculation and jobbing on the part of parish officers may be prevented." The Poor law bred tramp and able-bodied loafer were to be reformed by stern repressive methods; children were to be encouraged to assist in the support of their parents; parents to be made to support their offspring; and the Commissioners conclude their report thus: "We have now recommended measures by which we *hope* (the italics are mine) that the enormous evils resulting from the present maladministration of the Poor Laws may be gradually remedied . . . We are perfectly aware that for the general diffusion of right principles and habits, we look, no

so much to any economic arrangements and regulations, as to the influence of a moral and religious education." This report was responsible for the Act of 1834. The principles of the Act—the New Poor Law, it was called—are (1) No one shall be allowed to perish through want of what is necessary for sustaining life and health; (2) Every destitute parent is bound to demand and obtain from the Guardians what is necessary for sustaining the health and life of his children; neglect of this duty is criminal; (3) It is obligatory on the Guardians of the Poor law to afford sufficient relief to all persons unable to maintain themselves: refusal to be an indictable offence.

There have been many amending Acts passed since 1834, but examining the principle upon which the Act of 1834 was based, can we wonder that Pauperism to-day has reached high water-mark? Had the Commissioners intended—which it is only just to say they did not—to break down that spirit of independence which should animate us all, to weaken the backbone of the nation, they could not have proposed more effective legislation for that purpose. Pauperism did not decline; repression has not achieved its object; worse evils have crept into the system, until to-day the annals of the world probably do not contain a greater scandal than our Poor law administration. I desire here to characterise it as a mighty imposture and a gigantic fraud on the ratepayers. To depend on the influence of a moral and religious education to combat Pauperism was, as we see around us to-day on every side, a very great mistake indeed. Legislation on economic and commonsense lines was needed if pauperism were to be banished from the land (differentiation must be made here between "pauperism" and "poverty" for "The poor ye have always with you"), and legislation is needed now more than ever. I shall have more to say to this in the next portion of this article.

As if the multitudinous Acts of Parliament, Poor law Orders, and legal decisions, are not in themselves sufficient to make confusion worse confounded, we find there are four distinct authorities, "three of whom are able to alter their administration 'fundamentally' " (vide *Encyclopædia Britannica*, Vol. 31):—

Firstly, we have the Local Government Board as the principal authority for the administration of the Poor laws. This Board is largely answerable for much of the wastage during a long period of years by its incomprehensible delay in dealing with matters submitted to it by the Guardians and others concerned in the administration of these laws. Taking the place of the old Poor Law Board by the Act of August 1871, so far as Poor law administration is concerned, the Board has been a complete and perfect failure and must soon give way to something different.

Secondly, the Poor Law Guardians—they have been a similar failure, but from a different cause. To expect men and women, drawn chiefly from the trading classes, unfitted educationally, destitute of any previous training, to administer the Act of 1834 in its letter and its spirit, encumbered as it now is by numerous amending Acts, is too ludicrous for words were it not so exasperatingly stupid. And as though the Guardians are not sufficiently clothed and burdened with authority, they have had thrust upon them extraneous matters in addition, such as the enforcement of the Vaccination laws and certain educational and other duties unconnected with the Poor law—I allude to their work on Assessment Committees, and so forth.

Thirdly, the Overseers of the Poor. The duties of these officials consist chiefly in the raising of the Poor Rate; but they involve others wholly unconnected with the Poor law. They also have power, in conjunction with the Guardians, to grant relief in cases of urgent necessity.

Fourthly, the Justices of the Peace. The duties of these



gentlemen are chiefly judicial. I find, however, that any two Justices have the power to give relief to paupers *without requiring them to enter the workhouse*. This power seems to me to strike at the very root of the Act of 1834.

As far as the Guardians are concerned, they have also certain duties in connection with Lunacy, and the Local Government Act of 1894 gives power to the Rural District Councils to act as Guardians of the Poor. There are six hundred and fifty Boards of Guardians, and six hundred Rural Councils in the country. With this multiplicity of authorities and the chaotic state of the Poor law, we may cease to wonder at the scandals which occur from day to day. One of the saddest features of our system is that it has bred for us a race of paupers; and simultaneously a race of officials. The former look upon the Poor law as the line of least resistance in securing for themselves the necessities of life. Workhouse Masters will bear me out that even when work has been obtainable in certain districts, so accustomed have the idlers become to the stoneyard and the oakum test, that sooner than take on a job at fixed wages outside they have preferred the "test" and "free grub" and the accompanying loafing. To the Poor law bred tramp, to the Workhouse able-bodied loafer, the "test" has no terrors, seeing that in a very little while he can do his task and amuse himself in any way he likes for the rest of the day. The "test," however, is a most formidable one to the uninitiated; to the individual it is cruel, and to the ratepayer it is costly. The sooner the "test" is abolished, the better.

For many generations the Poor law schools have been nothing more than forcing houses for paupers. Paupers are here turned out machine-made, all to one pattern. These schools have done much to thwart the intentions of the promoters of the Act of 1834. Just as it was true, prior to 1834, that farmers paid part of their men's wages out of

the Poor law, so is it equally true now that many employers of female labour look to the Poor law to help them out with their wretched victims' wages. This is a fact that is well known to Guardians in large centres of population.

We come now to that anachronism, the Law of Settlement, or the Removal Laws as they are also termed. It may be of interest to the antiquary, but of what practical utility it is to-day to the ratepayers of England and Wales I know not. The "religious and moral influences" of the Commissioners are here seen at their worst. Surely it will be conceded, in the year 1906, that a pauper's settlement should be his place of residence at the time of his chargeability. The conditions of life underlying society to-day differ vastly from those obtaining when this law was passed in 1662. It is obvious that this musty statute must go. I shall return to this subject in the concluding part of this article, but must now proceed to give some fresh facts and figures, culled chiefly from the Reports of the Local Government Board, which deal with the cost of pauperism. From 1880 to 1904 we spent on in-maintenance £54,316,002, and on out-relief £65,226,425, making a total sum spent on paupers of £119,542,427. In addition, there was spent on salaries of officials £39,817,478; repayment of loans and interest £16,736,163; other expenses £29,558,509; Lunacy £36,264,702; bringing up the total cost of pauperism for the twenty-five years to no less a sum than £241,919,279. In 1864 the cost of 999,400 paupers was £6,423,381; in 1904 the cost of 769,029 paupers was £13,369,494. As we glance over these figures the startling fact reveals itself that the cost increases year by year whilst the number of paupers decreases. The cost of officialdom in 1864 for looking after 999,400 was £696,098. The cost in 1904 with 769,029 paupers was £2,358,851. So that for superintending 230,371 fewer paupers in 1904 the officials had a rise of £1,662,753. Truly a marvellous administrative achievement, only emulated by a similar success in extravagant building.

The amount authorised by the Local Government Board to be spent upon Poor law buildings in 1904 was £941,258; and "in previous years" the grand total was £30,917,095. Let us examine one of the items. In 1903 the Poplar Guardians were permitted by the Local Government Board to spend £144,725 upon "Erection of Schools on land at Hutton, Essex; provision of fittings and furniture." The report for the year 1904-5 is silent as to the further cost; but it was stated recently at a public meeting at Poplar that the cost to date is nearly £180,000, and the accommodation is only for 600 children, which works out at £300 per child. There are other similar instances in the Reports, but space will not permit of my quoting them; I content myself with asking, what proportion of the ratepaying community are able to house themselves at an outlay of £300 per head?

I invite you now to consider the working of the chaotic bundle of legal enactments on the daily life of the people. Let us take a case from the ranks. A man falls out of employment—he belongs to the respectable, hardworking poor; he uses up every available source of outside help, and then, with absolute starvation staring him in the face, with hungry wife and little ones at home, he musters up courage to apply, crestfallen and abashed, to the relieving officer. A very long list of questions is answered more or less satisfactorily, and the applicant is given some relief in kind till the officer can visit the case. The applicant goes away with the flag of hope fluttering in the breeze, mast-high, because he thinks he will be now tided over his temporary difficulty and helped back to work. Here is an instance of many thousands, where the Poor law, if properly amended, might help in such a way that the applicant could not only be assisted over his temporary trouble but assisted minus the stigma of pauperism.

Further, I would ask my reader to accompany me, mentally, on a journey with a relieving officer. We

have arrived at the house of an applicant for relief. It is miserably poor, though clean. There are certain voids amongst the furniture which speak for themselves. Certain revered household gods gone for ever. A chair perchance, that some loved mother or other relative had used for years, may perhaps have died in, and which has, therefore, in these people's eyes become something little short of sacred—but it has gone together with other useful and necessary furniture. That alone remains which barely suffices for sleeping and sitting purposes.

"How long have you been out of work?" asks the officer of the Poor law.

"Six weeks, Sir," the applicant replies.

"What prospect have you of getting work?"

"Well, Sir, my old foreman told me this morning, So-and-so would take me on in five or six weeks' time, and if you can grant me relief till then, I shall do."

"I am sorry," rejoins my friend, "that all I can do for you is to offer you and your wife the House, and your children the Schools. You can come and see the Guardians to-morrow if you like, but it is my duty to tell you that this is all they can do, as it is the law."

I have heard many a man in his honest repudiation of the stigma of pauperism for himself and his loved ones—for these people love each other,—curse the law in terms coarse and loud, and declare his determination to starve sooner than sell what is left of his "home" and enter the workhouse. Our friend is about to depart from the abode of woe—soon probably to be the scene of murder or of suicide—prescient with some such thoughts as these derived from long years of experience. He fumbles in his pocket, and then places something in the woman's hands, mumbling as he does so, "for the kids," who are clustering around their mother, with white, pinched, frightened faces, faces with all the semblance of childhood effaced, and likening unto those of old men and women.

The system which causes such scenes as this is going on to-day in all its old-time intensity, its needless wrong and shame, and its cruel influence on children both born and unborn. You don't know of this evil? That can only be because you won't investigate for yourself. It is not an unusual thing for the Relief Committee of the Guardians to tell applicants in temporary distress, as an alternative to selling up their home as a prelude to "coming in," *to bring their furniture into the House* to be stored up. The grimness of this unintentional mockery is evident, for what chance has a man of obtaining another cottage or rooms who comes direct from the workhouse? This is how many thousands throughout the country are manufactured into permanent paupers, for the want of a little timely considerate assistance, without disfranchisement and stigma. Many an old person might be assisted (when these laws are consolidated and amended, or, better still, superseded)\* to live with children or friends willing and able to look after them. The relief, however, must be sufficient. I should prefer this course to the costly waste in building which is now so rampant.

Again, one frequently sees young lads and girls of seventeen or eighteen applying for doctors' orders. Just think of it! Of course these have not long left the "forcing house"—the Poor law school. If this is not a case of catching your pauper young and training him in the way he should go, I don't know what it is. Then we have the scandal of single girls and women repeatedly coming in to the workhouse to be delivered of illegitimate children, the unhappy offspring of vice encouraged, deliberately encouraged, by Act of Parliament. And there is a further scandal in the terrible and wicked waste of food in the workhouse. The Local Government Board lays it down that, given a certain number of inmates, they shall consume a certain number of ounces, or pounds, of food daily. The stomach

of the pauper, like that of other human beings, is sometimes in rebellion; it refuses to do its office; but the food is cooked just the same and wasted, while thousands who can barely pay their Poor Rates have to go without.

To sum up, then, as some of the results of the 1832 Commissioners' recommendations on the lines of "religious and moral influences," we have:—First, multiplicity of authorities; second, multiplicity of acts, orders, and legal decisions; third, the obsolete and costly Law of Settlement; fourth, the multiplicity of officials; fifth, mal-administration of bad, contradictory, and obsolete laws; sixth, waste, woe, and wantonness arising from a false system; and, seventh, absurd and wasteful administration of the Lunacy laws, creating crime.

*The Prescription.*—In order to remedy the evils of our existing Poor law system, I suggest that the following, or similar, proposals should be adopted:—

First, Homes of Rest for the Aged, with thorough classification of the inmates, differentiating between deserving and undeserving, respectable and not respectable. This would be easy of accomplishment were the aged poor made a general charge, instead of a parochial one. It would involve, however, a re-adjustment of taxation.

Second, The entire abolition, and at once, of those "forcing houses" for paupers, the Poor law schools; and the placing of the children under the Education Authority. The boarding-out system, with frequent and thorough inspection by female inspectors, is by far the best and cheapest.

Third, Infirmarys for the Sick, to which should be attached Convalescent Homes, wherein the worker could recuperate before returning to his work.

Fourth, Homes for the exclusive use of mental and physical incapables.

Fifth, The Poor law bred tramp and able-bodied work-house loafer must be compelled by Act of Parliament to produce their sustenance on a State farm-colony or starve.

I deny the right of these people to eat without work, and I do not see the sometime urged necessity of their living at all if they have to do so at others' expense. Society would be better rid of their presence, but as they probably owe their continued existence to the pious opinions of the 1832 Commissioners, let us give them a chance under a new Economic Distress Act which will first train them to work, and then compel them to work ere they get a mouthful of food.

The Acts, in my opinion, must be consolidated, amended, or superseded by new legislation, so that an entirely fresh system shall come into force. To reduce pauperism to a vanishing point this system will need to be on severe economic lines in dealing with the wastrel and unemployable, whilst humanity and common sense must characterise the clauses dealing with the other victims of pauperism whom I have mentioned.

The law of Elizabeth which made it compulsory for the parochial authorities to find work for the able-bodied was, it must be conceded, a terrible blunder. After only a short trial it was found to be impracticable.' How the Guardians since 1834 have also blundered with the principle we can see for ourselves. The reason is plain—it is unscientific, uneconomical and impossible, and therefore unworkable; hence the Guardians were forced back on costly makeshifts for work in the shape of stone-breaking and oakum. This principle of compulsory work, however, is so valuable that it must be considered and included in any fresh legislation, but it must be applied rationally, and the land probably affords the best medium in the form of State Farm colonies, some of which should be industrial only, while others should be

of a penal character with power of detention. That each parish should look after its own poor was not only unworkable but was inequitable then as now, and must pass away with new legislation.

In my opinion the Act of 1834, because its principles are unsound, must be repealed. The terrible amount of pauperism to-day; the number of mendicants (we must distinguish between pauper and beggar) existing in our midst; with officialdom taking its vice from both of these classes; the thousand and one scandals we find amongst us to-day; all take their source from the Poor Law Act of 1834.

The Statesmen of this country must realise the absolute necessity of the abolition of the Law of Settlement, firstly, because it is an anachronism; secondly, because it is cruel to the poor; and, thirdly, because it is exceedingly costly. Guardians fight and quarrel over the wretched paupers through all the Courts right up to the House of Lords at the expense of the rates.

Those in temporary distress should be sent to the State farm-colony; if the temporary character of the distress become chronic the applicant and his wife and children should be drafted to one permanently, always reserving to him the right of leaving should he satisfy the authorities that he has obtained permanent work in his trade or calling. The relieving officer could have power to pass an applicant on to a farm temporarily but not permanently. This power must be reserved for the Board having local control. A Ministry of the Interior, or some other such constituted authority, could administer the new Distress Act, as well as the Lunacy laws, which also require consolidation and amendment.

LOUIS SINCLAIR.

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### III.—FORTY PROPOSITIONS IN THE LAW OF NEUTRALITY.

WHEN the Emperor Justinian entered upon the work of reducing the Case law of Rome to a formal code, he found himself confronted not merely by a gigantic accumulation of material, but by a series of actual contradictions between accepted authorities. Some of the most important and inveterate of these dated back to the days of Augustus and the conflicts of the Proculians and Sabinians. Before the work of digesting could be entered upon, and minor discrepancies reconciled, it was necessary once for all to come to some determination on these troublesome outstanding subjects of secular dispute, which would otherwise have continually impeded the work in its progress.

To the Imperial Commissioners was referred the function of overcoming this initial difficulty. They applied themselves to the work, and in a short time had cut the various knots. Their determinations are known as the *Quinquaginta Decisiones*.

It is with no view of emulating their labours, but with the lesser aim of paving the way towards some such clearing of the ground in the matter of the law of Neutrality, that the following propositions are put forward. It may be taken as certain (though it is the unexpected that happens) that in the near future a serious attempt will be made to promulgate a coherent and authoritative code of neutral right and duty. It is to be desired that in the meanwhile discussion should not spread itself at large over the field, but should be concentrated and focussed on those points which are in need of solution before any real progress can be made.

It is beyond the purpose of this paper to enter into any detailed exposition of the motives which have led to the

adoption of particular solutions. The first two propositions, as will be seen, were suggested by the *locale* of the recent war; the third, by the favour which has lately been shown to the quite novel and startling institution of "internment," and by the case of the *Retchitelri*. The next three are relevant to the cruise of the *Petersburgh* and *Smolensk*. The question of the restoration by a neutral of a prize, coming within its territory, which has been taken by a vessel which at some previous period has been culpable of a breach of the territorial State's neutrality, was discussed by Lord Stowell in *The Twee Gebroeders*.<sup>1</sup> He dealt with the specific instance of the Dardanelles, and came to the conclusion that the mere passage over neutral waterways (not in actual pursuit of a particular quarry) would not vitiate subsequent captures, unless it were unpermitted, or had been permitted "on false representation, and suggestions of the purpose designed." It has not been thought necessary to reproduce the words regarding fraudulently obtained permission. Such a permission is in reality no permission at all.

The numerous cases in which the Russian cruisers took to themselves liberty—a liberty never assumed in days when neutral rights were much less regarded than at present—to sink neutral ships, gives occasion for clauses 7—12. Proposition 11 is particularly devoted to the North Sea incident. The sixteenth decides the question of convoy adversely to the British view: it is believed that a concession to the universal sentiment on the European continent in this respect, would be appreciated, and would cost little surrender of belligerent advantage. The eighteenth, accepting the French practice in matters of blockade, is a greater concession; but the convenience can hardly be disputed of substituting a definite written notification for a hazy "notification by notoriety" which is possible under the

<sup>1</sup> 3 C. Robins. at p. 353.

English system, and is always liable to uncertainty and abuse. The French system also secures that the blockade shall be an effective one; and it is far from enforcing no inconvenience on the ship which is notified, for she must abandon her voyage and proceed to another port.

Propositions 21 to 28 relate to contraband, and the bearing of the Declaration of Paris upon goods consigned to the enemy's government or its armed forces.

The duties of a neutral government within its own territory in relation to troops or individual soldiers or sailors of belligerents, or war-ships of the latter, and in relation to the supply of men and material to them from its shores, form the subject of the concluding sections. The bearing of prior treaties on such duties deserves more attention than has usually been accorded to it, except in the matter of the passage of belligerent troops. Vattel, however, regarded it as universally legitimate to furnish the supplies contracted for by treaty; no doubt, with an eye to Swiss recruitment. It may still be a question whether a treaty (*exempli gratia*) ceding an arsenal to another Power under the condition that the ceding State shall be entitled to receive annually a certain amount of rifles and guns from the other, would necessarily be an illegal compact which must be suspended in time of war.

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#### PROPOSITIONS REGARDING THE LAW OF NEUTRALITY.

1. A belligerent is not entitled to treat the neutrality of a third Power as in any way qualified, or as restricted by reference to a given area.

2. If one belligerent makes use of the territory of a third Power for the evolutions of troops immediately directed against the other belligerent, the latter may take such forcible steps as may be necessary to protect itself, even within the neutral territory; provided that the neutral Power admits that it is not in a situation to guarantee its

safety from the threatening force. In the absence of such an admission, the counter invasion is *casus belli*: but not *bellum*, so long as the operations are not directed against the neutral.

3. The same principle applies to the use of neutral ports and waters by a belligerent, but in a much modified degree: because (1) there is an essential difference between the military occupation of territory by an armed force (which must displace the neutral jurisdiction) and the presence of vessels of war in its waters (which is perfectly consistent with it); (2) because the presence of an organised army within a territory other than its own is incapable of innocent explanation, whereas a fleet (and much more a single vessel) may be sent to a port in pursuance of a correct intention, of which it would be irregular to erect the other Powers into the judges. The exercise of force within neutral waters can be justified by the fact of a hostile attack, but by no other necessities of self-preservation from lawful enemies, even if unequal or undue assistance is afforded them by the neutral.

4. A belligerent may commission vessels in a neutral port: but the neutral concerned may decline to recognise the validity of their prizes, made before they have entered a home or an allied port. And the neutral may, in such a case, refuse such vessels the hospitality which she accords to the ships of the enemy.

5. A belligerent vessel cruising in waters in which she has by treaty no right to be, must be recognised as a lawful combatant: but as regards the treaty Powers, she is in the same position as a vessel commissioned in one of their ports.

6. Prizes coming into neutral territory before condemnation may be seized and restored, after due process, by the neutral, if captured (1) within the territory of that neutral; (2) or by a ship which has been commissioned in, or has made a base of, or has made an unpermitted use of, the territory of that neutral.

7. It is in no case permissible to sink or otherwise destroy a neutral prize. But absolute contraband may be removed to another vessel or jettisoned, in case of necessity.

8. The exigencies of military operations against the armed forces of the enemy may, in an extreme case, justify the destruction of a neutral ship on the high seas: but they do not include such cases as are raised by (A) the danger that the neutral ship will convey information which may eventually reach the enemy; (B) the danger that goods on board the neutral ship will prove of great use to the enemy's forces; (C) a probable or hypothetical danger:—but only such cases as for instance occur when the only obvious mode of escaping from imminent destruction involves running down a neutral ship. In such cases full compensation must be paid, and immediate explanation offered to the neutral.

9. But a neutral voluntarily intervening in a conflict by approaching the hostile parties, or by not taking ordinary care to keep out of the way, must accept the risks incident to so doing.

10. A belligerent has no right to interfere with neutral vessels on the high seas on the ground that they hamper his operations, or are likely to report them, provided that they are not acting in concert with the enemy's forces, government or subjects. In applying this proviso, a belligerent acts at his peril, and should the fact not be clearly established, there is due to the neutral not only compensation but such apology and amends as are usual in case of the violation of territory.

11. If circumstances arise which induce a belligerent to damage or destroy a neutral vessel on the high seas under the impression that it is hostile, the presumption is that the act was unwarranted and calls for an ample apology and satisfaction as well as for an expression of regret. The presumption is capable of being rebutted, but only by strong circumstances making it obvious that the belligerent officers

did not postpone the paramount rights of neutrals to the safety of their own operations or to any less interest, but took every possible precaution to avoid danger to neutrals, even at considerable risk to themselves. If this is established, it will be sufficient that compensation be paid.

12. And, in general, the guiding principle in cases of armed interference by belligerents with neutral vessels is, that the freedom and safety of the high seas is to be regarded before the interest of belligerents.

13. With regard to acts not deliberately directed against a particular vessel (known to be neutral or not), but likely to cause damage on the high seas to neutrals, the same principle is to be applied. It is accordingly not permissible to place floating mines on the high seas. But the use of torpedoes, being consecrated by general opinion, is not unlawful, even though stray unexploded torpedoes may remain unrecovered after being fired. The principle must not be extended to other cases of great importance to a belligerent, involving moderate risk to neutrals. It rests solely on the general agreement to use, and to accept the risks of, torpedoes as a legitimate weapon in all waters.

14. Public ships are exempt from visit and search. Should they attempt to force a blockade they may be forcibly excluded, and, if they resist, captured. They may not carry belligerent troops or despatches, nor contraband; but diplomatic means must be resorted to, to secure redress in such a case.

15. Mail packets belonging to private owners, even when under government contract, have (except by courtesy) none of the exemptions of public ships.

16. Convoyed ships are exempt from visit and search, except upon an exposition of motives to the commander of the convoy: when a joint search is to be made.

17. The acceptance of belligerent convoy is an identification of the ship or goods with the enemy, and a ground of capture.

18. The existence of a blockade must be individually and expressly notified to a vessel before it can be said to violate it. \*

19. Pressing military (including naval) necessity may justify the user by a belligerent, for its own purposes, of neutral movables, even though not assimilated by their local situation to enemies' goods (compensation being made to the owners). But this *droit d'angarie* cannot be exercised on the high seas.

20. As against the other belligerent and all Powers except the territorial Power and its suzerains (if any), a belligerent is justified in the exercise of force within neutral territory.

21. Intention is too subtle and too easily evaded a test to be a proper one for the decision of the question whether neutral ships or their cargoes may, in a given case, be subjected to the violent exercise of belligerent force on the high seas. "

22. Objects of the same direct usefulness for purposes of war, compared with the frequency of their employment for purposes of peace, as weapons, sulphur and saltpetre were in the seventeenth century, are contraband. Objects of a less ratio of direct usefulness for purposes of war to the frequency of their peaceful employment (such as charcoal in the seventeenth century, and coal and cotton in the present), are not contraband, and cannot become such by the existence of an intention that they shall be used by the enemy's armed forces.

23. They may become so (unless unfit for the direct or indirect furtherance of operations of war), by being in course of transit to an enemy's port of naval or military equipment: but in that case the owner is entitled to their value plus ten per cent. profit, and the ship-owner to freight and demurrage.

24. Whereas the Declaration of Paris exempts from the freedom of hostile goods on a neutral ship goods which are contraband of war: and whereas hostile goods are never

contraband of war and it is therefore necessary to attach some secondary meaning to the phrase as there employed:— It is understood that articles belonging to the enemy are here intended (1) which, if neutral, would have been absolute contraband of war; (2) which are the property of, or consigned to, the enemy government or its agents, and are capable of warlike use.

25. To such articles so excepted are applicable, not the laws of ordinary contraband of war, but the laws which formerly regulated the position of hostile goods laden on a neutral ship.

26. There can be no contraband on board a vessel unless its destination is the port of a belligerent; except for the purposes of the said proviso in the Declaration of Paris.

27. (In accordance with para. 21.) It is not permitted to captors, being interested parties, to invoke evidence, however apparently well-grounded, in order to show that the destination of a prize or of the whole or part of its cargo was other, or would ultimately have been other, than appears from the ship's papers and the declarations of the crew—except when these are contradictory, ambiguous or incomplete, or are inconsistent with the physical situation and course of the vessel.

28. The carriage of absolute contraband entails confiscation of the vehicle, in the following cases only, viz.:—

(A) When it is contrary to express treaty;

(B) When the ship-owner, or one of several co-owners is also owner of the whole or part of the contraband; or is a director, secretary, manager, or large shareholder in any company which is such owner of contraband; or, being such owner of contraband, is a director, secretary, manager, or large shareholder in any company which is owner or co-owner of the ship;

(C) When there is fraud or spoliation of papers.



The carriage of occasional contraband never entails confiscation of the vehicle: nor does the carriage of absolute contraband entail confiscation of the surplus innocent or purchasable cargo.

29. Passage across its territory must be refused by a neutral to the armed and organised forces of a belligerent, unless the latter possesses a servitude in the nature of a real right available at all times and for all purposes over the territory of the latter. In such a case, however noxious it may be to the other belligerent, the use of the road cannot be forcibly hindered, nor is it the duty or the right of the neutral to prevent it.

30. The presence within its territory for a longer time than is necessary for the enjoyment of such a right, of the armed and organised forces of a belligerent, or of refugee soldiers, entails upon a neutral State the necessity of interning or of disarming them, or of handing them over to some neutral State which is willing to do so. If the sovereign of the interned persons does not forthwith pay the expenses from time to time incurred by the neutral, the other belligerent must recoup the costs of the action thus taken for its benefit: in default, the interned persons may be set at liberty.

31. Neutral vessels which rescue shipwrecked seamen or the survivors of a naval action, and neutral nations to whose shores such survivors may come, are under no obligation to constitute themselves their jailers for the benefit of the opposite party. If, however, the asylum was afforded in the territorial waters of the latter, the men must be given up to them.

32. The neutral, in such a case of rescue or asylum, may (except where the rescue was effected in belligerent waters as above) retain and intern seamen without offence to their sovereign. In the like case, the seamen may, also without offence, be sent home on parole, which they are

bound to observe. But it is not incumbent on the neutral to adopt these courses, which, besides, must be impartially applied to both parties, if applied to either.

33. A vessel carrying seamen so paroled is not thereby subjected to capture by either belligerent. Should it come within the territory of a fourth party, and the seamen escape, the fourth party is not bound to intern or re-capture them, but it stands in exactly the same position as the third party originally did. The fourth party, however, is not warranted in voluntarily interfering with the paroled men while on board.

34. Neutral nations are under no obligation to prevent the use of their ports and waters by a belligerent, subject to the following exceptions :—

(A) They must not allow a belligerent war-ship, of whatever kind, to depart from their territory for the first time in that capacity, if she does so in a fit state for immediate warlike use, and manned by a fighting crew, whether commissioned or not.

(B) They must not allow the augmentation within their territories of the warlike force (including the special adaptation of telegraph-ships, torpedo-store-ships, etc.) of a belligerent vessel, though they may allow the increase of its speed and sea-worthiness, and may allow the replacement of armament, etc., temporarily removed for the purposes of repairing or surveying the vessel prior to the outbreak of war.

(C) They must not allow their territory to be made a base of maritime operations by the belligerent Power. Repeated visits will not of themselves constitute a base of operations, but habitual repeated visits of the same ship to the same coast are essential to its establishment.

35. Neutral nations may require the departure from their territory of belligerent vessels at their arbitrary discretion,

provided that impartiality (substantial as well as formal) is exercised. In case the belligerent ship refuses to comply, she may be forcibly expelled, but she cannot then or subsequently be forcibly captured, disarmed, or detained, unless she resorts to force.

36. A neutral nation may not by gift, loan or sale, directly supply the belligerents with troops or warlike material. But it is under no obligation to prevent its subjects from doing so: except in the case of officers and material (such as auxiliary cruisers) over which the government possesses special rights.

37. In fulfilling its neutral duties, a neutral nation is under no circumstances bound to a higher standard of care than that with which it watches over its own interests: and in general much less will suffice, as the war was not due to its own act and ought not to throw upon it greatly increased responsibilities; which, besides, go to discourage neutrality.

38. In particular, a neutral does not guarantee the safety of its territorial waters, and cannot generally be made responsible for a violation of them.

39. A neutral nation may allow its subjects and other persons within its territory to lend money or credit to, or to enter the service of belligerents. Provided that, in the latter case, the entry may not take the form of a hostile expedition.

40. A neutral nation may supply a belligerent freely with news, inventions and information, and is not even obliged to be impartial in this matter—as otherwise the security of diplomatic intercourse would be affected.

T. BATY.

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## IV.—THE BAR IN FRANCE.—PART I.

THERE are two great fundamental distinctions between the constitution of the Bar of England and the constitution of the Bar in France, one a matter of corporate entity and the other a matter of internal government. The Bar of England is one entire body, in practice distributed to some extent into parts or local entities. The Bar in France consists of many distinct local orders, each in theory separate, but each in practice having with the others a singularly close association, and each having in its code of customs a system almost identical with that of its compeers. Again, the Bar of England has as its authority of domestic discipline a group of Four Inns of Court, having no corporate connection with each other, no direct system of representative government, and no direct association with the actual practice of the profession. Each Bar in France, on the other hand, is, regarding its system of inner control, self-contained; its officers are selected by the members of the order, and it is both one of the governing criteria of the selection, and also one of the results of that selection, that the status of the official should be a status in the active pursuit of the profession. It may be added, that both in England and in France the advocate is free from State control, and the authority of the Court of Justice over his conduct is limited to the expression of an opinion regarding his attitude, or the course pursued by him, in a particular case.

Now, these differences of constitution and of discipline, if one excludes from consideration the influence of racial characteristics, and of those incidents which are called accidents, which as frequently intervene in the development of a constitution as in the evolution of a species, are the direct result of several historic facts.

(A) The framing of France as a complete national entity was far later than that of England. By the end of the 11th century England (not without controversy, but without reversal) had received its national insularity. It was not until the reign of Louis XI, that is to say, until the passing of some centuries, that the Kingdom of France received its ultimate territorial limits, and during the flux which preceded that solidarity, many of the forensic constitutions of France were receiving local expression and cohesion. Whilst the internecine struggles in England were either unsuccessful revolts or dynastic strifes, the internal struggles of France were almost international in their character.

(B) The ultimate constitution of the Courts of the Realm in France was far more localised than in England. When the Aula Regis of England became fixed at Westminster, it developed into the Courts of England. When the Parlement in France ceased to follow the progress of the King through France, it became the Parlement of Paris. When causes came to Paris from Lyons or Rouen, they came as to a High Court of Appeal; whilst the judges who journeyed from Westminster to Oxford or York, journeyed as itinerant justices of a Court of first instance. As the Judicature, so the Bar. In England it was a national Bar, with local divisions in so far as the Circuit system developed. In France there were Bars of each of the High Courts which were scattered throughout the country; and

(c) As a cause of this system of a group of Local Bars, and as a consequence, each order of advocates in France became far more than in England a political force actively asserting political influence. In England, though advocates were from time to time prominent political personages, the order of advocates, or the Bar of England, was never in itself a corporate political force, or indeed took any definite part in the history of England. In France the Parlement

of Paris was not only the High Court of the Realm but also the Registry which gave the sanction of quasi-legislation to Royal Edicts. Every great political change affected its power. The order of advocates followed its political fortunes throughout the centuries.

There were other causes. The stand taken by the various orders of the advocates for the liberties of the Gallican Church against the pretensions of the Papal See; the extent to which the successive Kings of France rested on the support of the *Gens de Loi* in their strife with the *Gens d'épée*; the part taken by the different orders of the advocates in the ebb and flow of mediæval turmoil; their intervention in every national revolt which successively destroyed Feudalism, Romanism and Absolutism. The history of the orders of advocates in France would be the municipal history of the towns and the national history of the Realm. The history of the Bar of Paris may be taken as the history of the Bar of France, because each of the Provincial Bars followed at a wide interval, but nearly step by step, the progress of the Bar of Paris.

A word as to the early beginnings of an order of advocates in France. Whilst Paris was still merely the *Lutetia* of the Romans and a military centre, there were amongst the Gauls schools of law at various towns, and notably at Marscilles, to which (in preference even to Athens), the noble youth of Rome were wont to resort. So far as can be judged from the remnant of contemporary record, the punishment then assigned for forensic misconduct was the exclusion of the guilty advocate from every part (save that of victim) in the religious ceremonies of the occasion. That the Gauls had a wide reputation for forensic eloquence may be gathered from the phrase of Juvenal, "*Gallia caustidicos docuit facunda Britannos*," a phrase which our Sir Edward Coke, with insular fervour for the credit of English eloquence and with some ingenuity, strove to explain away.

The superimposed judicial system of the Romans, which for over four hundred years obtained in the seventeen provinces of Gaul, was the next stage in the formation of ordered administration of justice. The Roman Code "*De postulando*" was applied to the advocates in Gaul. The brilliant racial qualities of the Gallic advocates are celebrated in that passage of St. Jerome, in which he refers to the expediency of the "*ubertas gallici nitorque sermonis*" being corrected by a course of Roman gravity. There are records of regularly constituted Courts in at least the following principal cities, Marseilles, Lyons, Rouen, Tours, Trèves, Reims, and Bordeaux. The advocate became an essential part in the administration of justice. In 369, for example, it was prescribed to the judges to hold their sittings in those places where the access was easy to the advocates. Undoubtedly at the time of the invasion of Gaul by the Franks, there existed there the beginnings of well-defined Bar organisations.

The occupation of Gaul by the Franks was not a violent subversal. The first article of the Constitution of Clotaire I, "*Jubemus ut in omnibus causis antiqui juris forma servetur*" may be cited. It would seem that under the early Franks the advocates lost something of the power which they had acquired under the Gauls. The Salic law was one of simplicity. Its directions of procedure were simple also; the confronting of the parties; the hearing of witnesses; the relegation of the advocates to the position of *mandataires* or agents of the parties. Charlemagne, who had a great love for juridical notions, did little to place the advocate on any better footing. Still there was his decree of 803 (followed in 819 by a decree of Louis le Débonnaire to the same effect), which gave an advocate to a party incapable of pleading, and this might be in the case of women, or of minors, or of the sick, or (as provided by the law of the Lombards) of the simple. There were, however, several affirmative reasons

why the orders of advocates lost rather than gained, or gained slowly. Amongst them may be placed the long period during which the Kings of France retained the right of personally sitting in judgment; the state of conflict in the laws, so that the result of a cause depended very largely on the Venue of Trial; the gradual process of the fusion of the language itself; the ecclesiastical methods of trial, such as the *Ordeal* and the *Sacramental Proof*; the feudal methods of trial, such as *Private Warfare* and the *Combat*; all these were inconsistent with or hindered the employment of the advocate. Successive ordinances, long after the *Etablissements* of Saint Louis (1270), and even up to the reign of Charles IX, authorised and regulated Trial by Combat. It is true that the advocate played a preliminary part. Nay, he might also play a dangerous part, if it happened (as it did to one Hughes de Falrefort) that, in the course of the formal demands which preceded the combat, he challenged in his own name instead of in that of his client, so as to be himself compelled to sustain the gage of battle. The feudal courts of the Nobles and the Ecclesiastical Courts of the Bishops, claiming exclusive jurisdiction over marriages, over the legitimacy of children, and over testamentary disposition, gave little scope for the advocate. Before the latter, advocates were forbidden to appear by a decree of Innocent III; before the feudal Courts there would scarcely be the assurance of a comfortable practice. To the first Courts, however, belongs the honour of initiating "*l'avocat des pauvres*," and to the second, to a large extent, the fashioning of the rules of the order of advocates upon lines which it is no exaggeration to term lines of chivalry.

The real foundation of the orders of the advocates in France was the fixing of the sitting of the Parlement in Paris. The Parlement was the Court of Justice presided over by the King. In the year 1320 it ceased to follow the



wanderings of the Royal Court. A few words on the history of the advocates prior to that date. The discovery of the Pandects at the siege of Amalfi (1137), gave a gréat impetus to the study of Civil Law. So keen was the pursuit of the study that the monks in France, as well as the monks in England, were forbidden to exercise themselves in it, lest it should lead to the neglect of the Canon Law. Accurse of Bologna, called "*l'idole des avocats*," however, led the way, and its knowledge speedily became one of the foremost glories of the Bar of Paris. Saint Louis with his zeal for legal reform finally directed the famous *Pragmatique* against ecclesiastical pretensions. This decree had its English analogy in the publication of the Constitutions of Clarendon. In France the advocates as an order supported the decree of the King to its extremest point, and in consequence received the fullest measure of royal recognition and favour. The publication of the two hundred and ten Articles of the *Etablissements* necessitated a trained body to expound and to administer this code of laws. That nothing was neglected to perfect the conduct of the advocate can be judged from that article which is intituled "*Comment avocat se doit contenir sa Cause*."

We shall at a later stage trace the course of the rules which fashioned the practice of the Bar. Here, in passing, we note the successive ordinances directed to this subject by Phillippe le Hardi and his successors. We cannot, however, forbear from noticing the famous advocates of the century of St. Louis,—Philip of Navarre, Guy Foucault (who became Pope Clement IV), Philip de Beaumanoir (the author of that very learned *Coutumes de Beauvoisis* which exercised so great an influence on the Law of France), and perhaps we may include St. Yves de Bretagne, who rivals St. Nicholas in being regarded as the patron saint of advocates. Guillaume Durand (the Author of the *Speculum du droit*) was so learned in all things that he was openly charged

with having relations with a familiar spirit, and so the course of profound learning in those days by no means ran smooth. And at length we arrive at the fixing of the sitting of the Parlement at Paris, and the consequent fixing of the status of the order of its advocates, which happened at the beginning of the 14th century.

We have not space to traverse the history of the Bar of Paris through the troublous times which followed. Throughout the long wars with England, and the plagues and famines which decimated France, and the chequered career of the royal fortunes, the Parlement of Paris and its order of advocates, though sometimes submerged by the violence of the moment, again and again distinguished themselves both collectively and individually by their patriotism and courage. After the English had ceased to have a footing in France the new *Pragmatique sanction* of Bourges re-asserted the liberties of the French Church on the lines of the Decree of St. Louis, and again the king had to rely upon the loyalty of the order of advocates. Honours of audience and of precedence were lavishly conferred upon the most distinguished members of an order which became, during the two centuries which followed the fixing of the Parlement at Paris, the most eminent in Europe.

Forsyth, in his *Hortensius*, gives the following vivid picture of the Sitting of the Parlement of Paris:—

“ The place of its sittings was the ancient palace of the  
 “ Merovingian kings, so well known in later times as the  
 “ Palais de Justice, which was given up to its use by  
 “ Philip the Fair. There, in a magnificent hall, richly gilt  
 “ and adorned with the fantastic forms of the arabesque  
 “ style of architecture, upon which the rays of light fell  
 “ softened through windows of coloured glass, the High  
 “ Court of Justice was held. Sometimes the king himself  
 “ sat there in his royal couch (*lit royal*) surrounded on each  
 “ side by the judges (*conseillers*) who sat upon an elevated

“bench covered with tapestry on which were woven the  
“lilies of France. Below this was another bench hung with  
“the same kind of tapestry, which was reserved for the  
“different officers of the Court, and also as a seat of honour  
“for the senior advocates (*anciens avocats*). In front were  
“the benches which were occupied by the younger advocates, attorneys, and persons interested in the cause that  
“was going on. The hall was filled with a numerous crowd  
“who delighted to listen to the eloquence of the Bar, and  
“not infrequently personages of the highest rank came  
“from distant countries to Paris merely to be present at  
“the sittings of that august assembly.”

A complete survey of the history of the Bar of Paris would of necessity include the description of a long series of famous trials in which the advocates took a more distinguished part by reason of their political environment. We propose to describe some of the most singular of these at a later stage. Amongst the foremost figures amongst the advocates of the 16th century must be placed Christophe de Thou (who was the first to receive the honour by a decree of the Parlement “*de se seoir sur les fleurs de lys*”), the Lamoignon, and Etienne Pasquier (whose contest for the University against the Jesuits is in itself a land-mark in history). Amongst the causes of the influence of the Bar of Paris in the 16th century were the zest which the Reformation gave to the exploration of every part of the field of law, and the complete codification (with the assistance of the order of advocates) of the Customs which formed the law of France. The first brought the advocates into the light of public notice as politicians; the second gave to them almost the rôle of legislators in a system where there was no legislation in the sense in which it was understood in England. During the troubles of the League the order of advocates followed the varying fortunes of the Parlement of Paris, and it was

Langlois, a distinguished advocate, who was amongst the first to prepare the way for the final triumph of Henry IV, when the Parlement was once and for all re-established at Paris. By the celebrated Edict of Nantes (1598) "Chambers of the Edict" were erected in the Parlements of Paris, Rouen, and Rennes, with special privileges to the orders of advocates.

In the beginning of the 17th century commenced a series of questions between the Parlement of Paris and its order of advocates, in which the Court sought to establish a control over the Bar. The Bar retired from their ministry in a body in 1602, but the modification of Henry IV of what was known as the Edict of Blois, which related in the main to matters of forensic etiquette, and the consequent restoration of the independence of the Bar, brought about a reconciliation. It must not be supposed that these contests were not from time to time renewed, but always the result was the re-assertion of the freedom of the Bar from control external to itself.

The most important event in the history of the Bar of Paris during this century was the creation by Jean de Montholon in 1661 of the Council of Discipline, which up to the time of the Revolution regulated the practice of the Bar. The next in importance was the foundation of the *Conférences de Doctrine*, which had for their primary object the training of the younger advocates in the knowledge and forensic practice of the law.

These two instruments of forensic progress might well lead up to the assertion regarding the Bar of France of the man who at the end of this period was the foremost figure in the legal world of France, that is to say, the Great Chancellor d'Aguesseau, who became Procureur-general at the age of thirty-two. One is forced to set down here that most famous passage from his work, *L'Indépendance de l'Avocat*:—  
 " *C'est un ordre aussi ancien comme la magistrature, aussi noble que la vertu, aussi nécessaire que la justice. Libre sans être*

*" inutile à sa patrie, il se consacre au public sans en être esclave, et il plaint le malheur de ceux qui n'entrent dans les fonctions publiques que par la perte de leur liberté."* It is not unjust to say that as de Lamoignon had given an impetus to the researches of the juriconsults, so d'Aguesseau gave a new impulse to the progress of the advocates. There were many works in which he refashioned the practice, or in which, perhaps, one would more correctly say, he reaffirmed the traditional principles of the Bar in France. In the instructions for the guidance of his son he enlarges upon the great value of the *Conférences de Doctrine* (or as we in England should say, the Moots), held by the Bar of Paris for the exercise of the younger advocates; upon the advantages of a very wide knowledge in the fitting of an advocate for the pursuit of his profession; upon the necessity of keeping the remuneration of an advocate free from the ordinary incidents of a contract, and upon those aspects of the office of an advocate which entitle him to regard distinctions and honours as prerogatives attached to his profession rather than as privileges granted by the King to a community. Amongst the leaders of the Bar of Paris during the first half of the 18th century were Normand (named L'aigle du Barreau), and Cochin, who declined the honour of election to the French Academy, on the ground that it was inconsistent with the dignity of an advocate to seek suffrages by the traditional method of personal solicitation. Among the great pleadings of the former, may be instanced that which asserted the legitimacy of Mlle. de Choiseul, and of the latter, may be selected that against the pretended wife of the Marquis d'Hautefort. One of the most delicate of compliments was paid to Cochin: *"Tout parle en vous,"* said a distinguished client, *"il semble que votre corps ait la faculté de l'esprit."*

In order to appreciate the external history of the Bar of Paris from the time of the Edict of Nantes it is necessary to

follow the chequered career of the Parlement of Paris. In 1641 Richelieu forced it to surrender its political functions, and ordered it to register the royal edicts without discussion. The troubles of the *Fronde* resulted in the restoration of the Parlement in 1649, but with diminished powers, and so it remained during the whole of the reign of Louis XIV.

Louis XIV, dying in 1715, by his will deprived the Duke of Orleans of certain of his rights of rank. In order to preserve his own greatness the Duke of Orleans brought the will to the Parlement, and by obtaining from the Parlement a decree of annulment of the will and decrees of consignment to him of the tutorship of the king with regency powers, he gave to the Parlement the control. It was given by the Regent the power of making remonstrances respecting the affairs of the realm before being obliged to register its judgments. The increase in the powers of the Parlement meant by inference the increase of the importance of the Bar.

There were, however, moments when conflict arose between the Courts and the advocates. In 1716 there was something amounting to a revolution in the Bar of Paris. No less than eighteen persons in succession declined the office of bâtonnier. This was by way of protest against the authority of the Bar over its own affairs being diminished. The Criminal Court had to wait for an advocate, one Sicault, engaged before the Parlement. A reproof, unjust, awaited that advocate. The Bar, with their bâtonnier at their head, resented the reproof, and in a body retired from the Court. Satisfactory explanations being forthcoming and complimentary assurances being given by the Court to the order, the conflict was averted.

In 1718 a controversy arose between the Regent and the Parlement respecting the issue of the bank-bills of Law. The Parlement refused to register the decree, and used their right of remonstrance against the measure. The Court

was obdurate and arrested two of the counsellors. The Parlement suspended its sittings. The order of advocates, with Du Cornet as its bâtonnier, supported the Parlement, and the rights of the Parlement were recognised by the Crown.

A singular display of the jealous regard for the privileges of the advocates was the "*affaire de la tête couverte*." The controversy between the Court and the Bar decided that when the advocate was reading, in the part of procureur, documents of procedure, he should be uncovered, and that he should be covered when, as an advocate, he was expounding the law itself.

Yet, though insistent on their own prerogatives, they were ever ready to support the Courts of law in their struggles against arbitrary power. In 1720 the Parlement refused to register a decree of the Regent constituting a trading monopoly in the Indies. The Regent seized the Palais de Justice and transferred the sitting of the Parlement to Pontoise. The advocates as a body refused to appear before the Court whilst it was held there. On the return of the Parlement to Paris the Bar received the formal thanks of the judges for the part which it had played. Two incidents show the progress of the Bar in dignity and precision of practice. In 1721 the title of Maître was conferred upon every practising advocate. Soon after this incident a formal decree of the Parlement adjudged that the ancient advocates should take their places in Court beside the judges, and the general body of advocates on high raised and tapestried benches, and by this time the Bar had reached its final development until the subversal of all institutions by the Revolution. To that Revolution the steps were very rapid. Parlement and the advocates stand and fall together. Their aid to the *Jansenists* in 1754 against the Papal Bull *Unigenitus* averted a revolt. In 1770 the Parlement, representing the public opinion of France, strove to limit the power of the King, and was sup-

pressed. The notorious Parlement Maupeou was short-lived, and in 1774 the old Parlement was restored. Three years later it was banished to Troyes. It returned, but the chaos of the Revolution was at hand.

The only other controversy which needs attention prior to the Revolution was that many times renewed between the *Avocats* and the *Procureurs*. Side by side with the order of advocates, from the time when the sitting of the Parlement was fixed at Paris, existed a body of lawyers who received the instructions of clients, and in their turn instructed the advocates. The order of procureurs instituted by an ordinance of Philip of Valois in 1342 became subject to the discipline of a joint committee of advocates and procureurs in 1508, from which it became free only by their own resolution in 1783. During these centuries there arose many quarrels between the two orders, in which the advocates endeavoured with more or less success to subordinate the functions of the procureurs and to limit their power. The most important of these was the controversy of 1710, which terminated in the supremacy of the orders of advocates and the definite separation between the functions of the two orders being re-affirmed.

We have traced the history of the Bar of Paris until the Revolution. The subsequent land-marks of its history we propose to briefly set forth at a later stage, before setting forth in sequence a description of the traditional customs which regulate its practice at the present day. It will be found that the perfection of its system of internal discipline, no less than the continuity and remarkable episodes of its history, fit it to be regarded as second to none as a forensic institution. The Bar of Paris is *primus inter pares* regarding the Bars in France.



## V.—THE PROVINCE OF THE JUDGE AND OF THE JURY.—PART II.

(Continued from page 24.)

### THE TRIAL OF SIR NICHOLAS THROCKMORTON.

THIS trial is reported in the first volume of the *State Trials*, at p. 869. It took place in the Guild Hall, London, on the 17th April, 1554 (1 Mary). The charge was one of high treason, and the substance of it was that the prisoner had been implicated in the rebellion of Sir Thomas Wyatt, whose trial is reported in the same volume at p. 861. "The report of the trial of Throckmorton is the earliest which is full enough to throw much real light on the procedure which then prevailed." (Stephen, *Hist. Crim. Law*, Vol. I, p. 353.) The trial was held before a commission, and the names of the commissioners are given. As to the ancient practice of trying great offenders before a commission, consisting of several judges and laymen, see Stephen, *Hist. Crim. Law*, Vol. I, p. 337. The names of the jurors were Lucas, Yong, Martyn, Beswicke, Becafield, Kightley, Lowe, Whetstone, Pointer, Bankes, Calthorpe, and Carter—names worthy to be held in remembrance. That the jury was an impartial one is shown by this fact: The Attorney-General had shown the sheriff's return to one of the judges, and certain jurors had been "noted to be challenged for the queen (a rare case)," and it is stated that those who were returned were "known to be sufficient and indifferent, and that no exceptions were to be taken to them" (*St. Tr.*, Vol. I, 871).

Notwithstanding these precautions with the jury-list or "return," two citizens were peremptorily challenged for the queen. Thereupon the prisoner demanded to know the cause of the challenge. To which Sergeant Dier<sup>1</sup> answered:

<sup>1</sup> Dier, *i. e.*, Dyer, afterwards a judge, and author of *Dyer's Reports*.

"We need not show you the cause of the challenge for the Queen." "Then" (the report proceeds) "the inquest was furnished with other honest men, that is to say, Whetstone and Lucas. So the prisoner used these words :"—

"*Throckmorton* : I trust you have not provided for me this day, as in times past I know another gentleman occupying this woful place was provided for. It chanced one of the Justices, upon jealousy of the prisoner's acquittal, for the goodness of his cause, said to another of his companions, a justice, when the jury did appear, 'I like not this jury for our purpose, they seem to be too pitiful and too charitable to condemn the prisoner.' 'No, no,' said the other Judge, 'I warrant you they be picked fellows for the nonce, he shall drink of the same cup his fellows have done.' I was then a looker-on, as others be now here, but now, wo is me, I am a player in that woful tragedy" (*St. Tr.*, I, 871.)

At the outset of the trial Throckmorton asked, "May it please you that I shall answer particularly to the matters objected against me, inasmuch as my memory is not good, and the same much decayed since my greivous imprisonment, with want of sleep and other disquietness. I confess I did say to Winter that Wyat was desirous to speak with him as I understood."

"*Stanford* : Yea, sir, and you devised together for the taking of the Tower of London, and the other great treasons."

"*Throckmorton* : No, I did not so ; *prove it*."

"*Stanford* : Yes, sir. You met with Winter sundry times, as shall appear, and in sundry places."

"*Throckmorton* : That granted, proveth no such matter as is supposed in the indictment." (*St. Tr.*, I, 872.)

This practice of "answering particularly" to the matter objected to against the prisoner, or dealing with each point as it arises, is very different from our modern practice of making a defence as a whole. It was a very convenient practice for prisoners when they were not allowed counsel.

The prisoner was strongly urged to confess by *Sergeant Stanford*, one of the commissioners, and *Sir Thomas Bromley*, the Lord Chief Justice.

"*Stanford*: I would advise you to confess your fault, and submit yourself to the Queen's mercy."

"*Bromley* (L.C.J.); How say you? Will you confess the matter? And it will be best for you."

To which the prisoner (*Throckmorton*) stoutly replied: "No, I will never accuse myself unjustly: but inasmuch as I am come hither to be tried, I pray you let me have the law favourably." (*St. Tr.*, I, 877.)

The evidence against him consisted almost entirely of confessions, particularly those of *Wyat*, who had been executed on the 11th of April, 1554, and of one *Vaughan*, who had been sentenced to death, but whose execution had been respited several times. The prisoner urged with force, "Here note, I pray you, that our law doth require two lawful and sufficient accusors to be brought face to face with the prisoner, and *Vaughan* is but one, and the same most unlawful and insufficient. For who can be more unlawful and insufficient than a condemned man, and such one as knoweth to accuse me is the mean to save his own life." (*St. Tr.*, I, 880.)

To this *Sir Nicholas Hare* (M.R.) replied.

"*Hare*: Why should he accuse you more than any other, seeing there was no displeasure betwixt you, if the matter had not been true." (*Ib.*)

"*Throckmorton*: Because he must either speak of some man, or suffer death; and then he did rather choose to hurt him he did least know, and so loved least, than any other well known to him, whom he loved most. But to you of my *Fury* I speak especially, and therefore I pray you note especially what I say." (*St. Tr.*, I, 880.)

Here is a direct appeal from the judges to the jury as to the weight of *Vaughan's* evidence.

He then begins a legal argument for the purpose of showing that Vaughan's confession ought not to be received as evidence at all by the jury, *i. e.*, as to its admissibility. He says: "In a matter of less weight than trial for life and land, a man may by the law take exceptions to such as be empannelled to try the controversies betwixt the parties," on the ground of interest or favour. . . . "Much more I may of right take exception to Vaughan's testimony, my life and all that I have depending thereupon, the same Vaughan being more bound to the Queen's highness than my adversary."

Thereupon *Sergeant Stanford*,<sup>1</sup> who appears to have acted the part of prosecuting counsel, although one of the commissioners, observed: "Yea, the exceptions are to be taken against the Jury in that case; but not against the witness or accuser, and therefore your argument serveth little for you."

"*Throckmorton*: That is not so, for the use of the Jury and the witness, and the effect of their doings doth serve me to my purpose, as the law shall discuss." (*St. Tr.*, I, 881.)

Vaughan, it may be observed, had been called to substantiate his confession, which he did "with a book oath"; but the calling of him was apparently regarded as a concession to the prisoner.

This argument is somewhat difficult to follow, and the purport of it is by no means clear; but the meaning appears to be this. If a juror may be challenged on the ground that he is an interested party, Vaughan's evidence as a witness ought also to be excluded, and for the same reason. As we shall see later on, there was a time when the jurors themselves were merely witnesses, and this fact seems to be present to *Throckmorton's* mind, and to form the basis of his argument.

Later on this passage occurs:—

"*Bromley (L.C.J.)*: Why do you not read *Wyat's Accusation* to him, which doth make him partner to his Treasons."

<sup>1</sup> *Stanford*, probably the author of *Staunford's Pleas of the Crown*.

"*Southwell*: Wyatt has grievously accused you, and in many things that others have confirmed."

"*Throckmorton*: Whatsoever Wyatt hath said of me in hope of his life, he unsaid it at his death." (*St. Tr.*, I, 885.)

And so the animated dialogue, or "verbal duel," as Sir J. F. Stephen calls it, went on between the Commissioners on the one hand and the prisoner on the other, with many interruptions on both sides, the jury meantime sitting quietly by, and, as is the wont with spectators, seeing most of the game.

The whole trial is a good example of the old Common law mode of trial "by examination," *i. e.*, by the reading of depositions and confessions, rather than by the personal testimony of witnesses, which prevailed before the Commonwealth. This is shown by the fact that the Commissioners (or Judges) not only admitted confessions by deceased persons, *e. g.*, Wyatt, but excluded evidence in favour of the prisoner. Witnesses for the prosecution were then called only if their depositions were challenged and disputed, and no witnesses were allowed to be called for the prisoner against the Crown. There was no examination or cross-examination of witnesses. Indeed nothing of the sort was possible when no witnesses, as a rule, were called. Consequently, prisoners were constantly demanding to see their accusers "face to face." There was a complete absence of the rules of evidence, as we understand them, and no approach whatever to the order and regularity of a modern trial. Throckmorton, as we shall see later, was allowed to address the jury a second time, after the judge's summing up.

The Court absolutely refused to allow Throckmorton to call any witnesses, and he himself admitted that it was not the custom to allow witnesses to be called against the Crown. He speaks of it as "the old error amongst you, which did not admit any witness to speak or any other

matter to be heard in the favour of the adversary, her Majesty being party"; but he goes on to declare that "her Majesty's pleasure was, that whatsoever could be brought in favour of the subject, should be admitted to be heard" (*St. Tr.*, I, 887), a declaration which certainly paints Queen Mary in a more favourable light.

We are strongly tempted to give the picturesque scene when the Court refused to receive the evidence of one John Fitzwilliams, whom the prisoner espied in Court and earnestly desired to call on his behalf; but we must pass to matter more cognate to our purpose.

When the time came for the prisoner to make his formal defence, he addressed the Court, but his remarks were really directed to the jury:—"And now to you of my Jury I speak especially, whom I desire to mark attentively, what shall be said." (*St. Tr.*, I, 886.)

After dealing with the evidence brought against him, viz., the various depositions and confessions, including his own alleged confession, he began a legal argument. His main contention was that even if the jury believed all the depositions laid against him ("which I trust you will not do") the facts did not bring him within the Statute 25 Edw. III, and "the Statute of Repeal made by the last Parliament"—"both which statutes, I pray you my lords, may be read here to the inquest." (*St. Tr.*, I, 887.)

"*Bromley*: No, for there shall be no book brought at your desire; we know the law sufficiently without book."

"*Throckmorton*: Do you bring me hither to try me by the law, and will not show me the law? *What is your knowledge of the law to these men's satisfactions, which have my trial in hand?* I pray you my lords, and my lords all, let the statutes be read, as well for the Queen, as for me."

"*Stanford*: My lord chief justice can show the law and will, if the Jury do doubt of any point."

"*Throckmorton*: You know it were indifferent that I

should know and hear the law whereby I am adjudged; and *forasmuch as the Statute is in English, men of meaner learning than the Justices can understand it, or else how can we know when we offend?*”

“*Hare*: You know not what belongeth to your case and therefore we must teach you: it appertaineth not to us to provide books for you, neither sit we here to be taught of you, you should have taken better heed to the law before you had come hither.”

“*Throckmorton*: Because I am ignorant I would learn, and therefore I have the more need to see the law, and partly as well *for the instructions of the Jury*, as for my own satisfaction which methink were for the honour of this presence.” (*St. Tr.*, I, 887.)

\* \* \* \* \*

“*Hare*: What would you do with the Statute-Book? The Jury doth not require it, they have heard the Evidence and they must upon their conscience try whether you be guilty or no, so as the book needeth not: if they will not credit the Evidence so apparent, then they know what they have to do.”

“*Cholmley*: You ought not to have any books read here at your appointment, for *where doth arise any point in the law, the Judges sit here to inform the Court*; and now you do but spend time.”

“*Attorney*: I pray you my lord chief justice repeat the Evidence for the queen and give the Jury their Charge, for the prisoner will keep you here all day.” (*St. Tr.*, I, 888.)

“*Bromley*: How say you, have you anything more to say for yourself?”

“*Throckmorton*: You seem to give and offer me the law, but in very deed I have only the form and the image of the law; nevertheless since I cannot be suffered to have the statutes read openly in the Book, I will by your patience guess at them, as I may, and I pray you to help me if I mistake, for it is long since I did see them.” (*St. Tr.*, I, 888.)

Thereupon the prisoner quoted from memory the words of the two statutes, viz., the "Statute of Repeal made by the last Parliament," and 25 Edward III, the former of which declares that nothing shall be taken or adjudged Treason but such as be declared to be Treason by 25 Edward III; and the latter of which runs as follows:—

"Whosoever shall compass or imagine the death of the King, or levy war against the King in his realm, or being adherent to the King's enemys without the realm, or elsewhere, and be thereof probably attainted by open deed by people of their condition, shall be adjudged a Traitor."

Here appealing again to the jury he said: "Now I pray you of my Jury, which have my life in trial, note well what things at this day be Treason, and how these Treasons must be tried and discerned, that is to say, by open deed which the law doth at some time term overt act." (*St. Tr.*, I, 889.)

His quotation of these statutes and his comment thereon extorted a compliment from the Lord Chief Justice.

"*Bromley*: Why do not you of the Queen's learned counsel answer him? Methink, Throckmorton, you need not to have the Statutes, for you have them meetly perfectly." (*St. Tr.*, I, 889.)

Stanford attempted to answer him, but Throckmorton replied:—

"*Throckmorton*: I pray you express those matters that bring me within the compass of the Statute of Edw: the 3rd, for the words be these 'and be thereof attainted by open deed by people of like condition.'"

"*Bromley*: Throckmorton, you deceive yourself, and mistake these words, 'by people of their condition;' for thereby the law doth understand your treasons, for example, Wyat is now one of your condition."

That is to say, the Lord Chief Justice construed the words "by people of their condition" as meaning *in pari delicto*, or in the same predicament; whereas they obviously mean *judicio parium*, or by the testimony of his equals.



"*Throckmorton* : By your leave, my lord, this is a very strange and singular understanding. For I suppose the meaning of the law makers did understand these words, 'By people of their condition,' of the state and condition of those persons which should be on the inquest to try the party arraigned, guilty or not guilty." \* \* \* \* Then, like a skilful advocate, seeing that he had made his point and that the jury appreciated it, he wisely did not press it further.

"*Throckmorton* : Well seeing you of my judges rule the understanding of these words in the Statute, by people of your condition, thus strangely against me, I will not stand longer upon them." (*St. Tr.*, I, 890.)

A little later he exclaims, "For God's sake apply not such constructions against me; and though my present estate doth not move you, yet it were well you should consider your office, and think what measure you give to others, you yourselves, I say, shall assuredly receive the same again." He then proceeds: "There is a maxim or principle in the law, which ought not to be violated, That no penal Statute may, ought or should be construed, expounded, extended or wrested, otherwise than the simple words and nude letters of the same Statute doth warrant and signify," and he reminds some of the judges that he had heard them say "in the Parliament House, that this maxim ought to be inviolable, and that it is 'very dangerous to the subject' to refer this construction of penal Statutes 'to any judge's equity which might either by fear of the higher powers be seduced or by ignorance and folly abused.'" (*St. Tr.*, I., 891.)

It seems impossible to follow this argument without seeing that, although it was nominally addressed to the judges (or commissioners) it was in reality addressed to the jury, and that *Throckmorton* was appealing from the judges to the jurors, and asking them to take upon them-

selves the decision of those points of law which the judges had so obviously not merely strained against him, but altogether misconstrued. It is in effect a very clever way of saying to the jurors, "You see how the judges distort the law; but you are not bound to take your law from them: you can put your own interpretation upon it." What else but this can be the meaning of his frequent appeals to the jury during the discussion of a point of law? "The Statutes are in English," says he, "and can be understood by men of meaner learning than the Justices." Whether the jury saw what the prisoner intended, and responded to the suggestion thus covertly made, it is not easy to say, but from the result of the trial it would appear that they did. The chief point of interest to us is that while the judges claim to have a monopoly of knowledge of the law and to be the sole repositories and interpreters of it (*St. Tr.*, I, 896), all the time Throckmorton was cleverly trying to induce the jury, not openly, in set terms, but none the less effectively, to draw their own conclusions as to what the law really was. The seed thus sown in the mind of the jury in *Throckmorton's Case* grew into fruit and ripened in Lilburn's two trials in 1649 and 1653.

As Throckmorton was continuing his address to the Court, the Attorney-General again interrupted him:—

"*Attorney*: Master Throckmorton, quiet yourself and it shall be the better for you."

"*Throckmorton*: Master Attorney, I am not so unquiet as you be, and yet our cases are not alike; but because I am so tedious to you, and have long troubled this presence, it may please my Lord Chief Justice to repeat the Evidence wherewith I am charged, and my Answers to all the objections, if there be no other matter to lay against me." (*St. Tr.*, I, 897).

"Then the Chief Justice Bromley remembered particularly all the Depositions and Evidences given against

the prisoner, and either for want of good memory or good will, the prisoner's Answers were in part not recited, whereupon the prisoner craved indifferency, and did help the Judge's old memory (*sic*)<sup>1</sup> with his own recitals."

After the judge's summing up the prisoner again asked leave to say a few words to the jury, and made "a short, pathetic address, full of texts" (Stephen, *Hist. Crim. Law*, Vol. I, p. 329), the gist of which was as follows:—

"You percieve notwithstanding this day great contention betwixt the Judges and the queen's learned council on the one party, and me the poor and woeful prisoner on the other party. The trial of our whole controversy, the trial of my life and lands and goods, and the destruction of my posterity for ever doth rest in your good judgments. *And albeit many this day have greatly inveighed against me, the final determination thereof is transferred only to you.*"

Then before the jury retired to consider their verdict, he requested the commissioners to give order "that no person have access or conference with the Jury, neither that any of the queen's learned council be suffered to repair to them, or to talk with any of them till they present themselves here in open court, to publish their Verdict." The fact that such a request was necessary speaks for itself. No comment is needed.

"Upon the prisoner's suit on this behalf the Bench gave orders that two Serjeants were sworn to suffer no man to repair to the Jury until they were agreed."

The Court adjourned about 2 o'clock, until 3, having sat since 8 o'clock in the morning—about six hours. The jury returned about 5 o'clock.

The fact of their agreement being advertised to the commissioners, the jury came into Court and the prisoner was brought to the bar. They were asked if they agreed upon their verdict and they "answered universally with one voice 'Yea.'" Whetstone was the foreman.

<sup>1</sup> Probably this should read, "the old Judge's memory."

"*Sendall* (Clerk of the Crown): Nicholas Throckmorton, Knight, hold up thy hand. Then the Prisoner did so upon the summons."

"*Sendall*: You that be of the Jury, look upon the Prisoner."

"The Jury did as they were enjoined."

"*Sendall*: How say you, is Master Throckmorton, Knight, there, Prisoner at the bar, guilty of the Treasons whereof he hath been indicted and arraigned in manner and form, yea or no."

"*Whetstone*: No." (*St. Tr.*, I, 899.)

\* \* \* \* \*

"*Bromley* (L.C.J.): How say you the rest of ye, is Whetstone's Verdict all your Verdicts. The whole Inquest answered, Yea."

"*Bromley* (L.C.J.): Remember yourselves better, have you considered substantially the whole Evidence in sort as it was declared and recited? The matter doth touch the Queen's highness, and yourselves also, take good heed what you do."

"*Whetstone*: My Lord, we have thoroughly considered the Evidence laid against the prisoner, and his Answers to all these matters, and accordingly we have found him not guilty agreeable to all our consciences." (*Ib.*)

\* \* \* \* \*

Upon hearing the Verdict the Prisoner said, "It is better to be tried than to live suspected," and then began to repeat the *Benedictus*. (*Ib.*)

\* \* \* \* \*

"The Court being dissatisfied with the Verdict, committed the Jury to prison." (*St. Tr.*, I, 900.)

Sir J. F. Stephen says: "Nothing could exceed the energy, ingenuity, presence of mind and vigour of memory which Throckmorton showed, or is reported to have shown, throughout every part of the case, and especially in the legal

argument." (*Hist. of Crim. Law*, Vol. I, p. 329.) Although Throckmorton says of himself, "I never studied the law: whereof I do much repent me," he so "handled" the Attorney-General (Griffin) as to compel him to appeal to the commissioners for protection. (See *St. Tr.*, I, 893.)

Throckmorton was soon afterwards released from prison, at the intervention, it is said, of Philip; and in the reign of Queen Elizabeth he earned distinction for himself as ambassador to the Courts of France and Scotland.

Thus ended the first great English criminal trial of which we have a full report. We have now to deal with the proceedings taken against the Jury. (See *St. Tr.*, I, 902.) Eight of them lay in prison from the 17th of April to the 26th of October, 1554. Four weak-hearted ones had previously been delivered out of prison on submitting themselves and saying they had offended. On the 26th of October these eight, of whom Whetstone and Lucas were the chief, were brought before the Council in the Star Chamber, "where they affirmed that they had done all things in that matter according to their knowledge, and with good consciences, even as they should answer before God at the day of judgment; and Lucas said openly before all the Lords that they had done in the matter like honest men and true and faithful subjects, and therefore they humbly besought" . . . . "that they might be discharged and set at liberty." "The Lords taking their words in evil part, judged them worthy to pay excessive fines." And finally they were sentenced to pay "a thousand marks apiece, the least," and they were committed to prison, there to remain till further order were taken for their punishment. On the 10th of November the Sheriffs of London were ordered to take an inventory of the goods of each of them, and to seal up their doors, which was done the same day. Eventually Whetstone, Lucas and Kightley were adjudged to pay £2,000 apiece, and the rest one thousand marks to be paid within a

fortnight. On the 12th of December, five of the eight were discharged and set at liberty upon paying £220 apiece. The other three made a declaration that their goods did not amount to that sum, and therefore they were delivered out of prison 'on the 21st of December on "paying three score pounds apiece."

"This rigour executed upon the jury" we are told, "was fatal to Sir John Throckmorton (the brother of Sir Nicholas), who was found guilty on the same evidence on which his brother had been acquitted." (7 *Rapin*, 134, and *St. Tr.*, I, 902).

Truly the powers of the petty jury were growing apace, when jurors dared the wrath of the gloomy and tyrannical Mary and her officers in such a way as this; and jurors were becoming fully alive to their duties and responsibilities when they were willing to incur such penalties in order to protect the honour and save the life of a fellow citizen whom, in their hearts and consciences, they believed to be innocent, in spite of the pressure put upon them to bring in a verdict of guilty. It is of course impossible to say with certainty what it was that weighed with the jury and influenced their minds; whether it was a general dislike of the old law of treason, or the personal popularity of the prisoner, or his spirited and eloquent defence, or the unsatisfactory nature of the evidence against him (mere confessions, without the production of the witnesses "face to face" with the prisoner to give their personal testimony), or whether it was the exclusion of the evidence which the prisoner wished to call; or again, whether the jurors observed the unfairness of the ruling of the judges on the points of law raised by the prisoner, and responded to the suggestion made by him to decide these points for themselves. Probably all these considerations operated more or less upon their minds. The great fact which stands out is, that a petty jury in such a case found a general verdict of not guilty.

As to the summoning of the jury before the Star Chamber and the punishment meted out to them, more will be said hereafter, in connection with the subject of perjury. For the present our way is now clear to consider Lilburn's two great trials in 1649 and 1653, in which the claim of the jury to decide questions of law was first definitely asserted and successfully maintained.

#### LILBURN'S TRIAL IN 1649.

King Charles I was beheaded on the 30th January, 1649. With the justice or injustice, policy or impolicy, of that grim tragedy at Whitehall, we have nothing to do. Widely different opinions have been held about it, and will no doubt continue to be held. So far as we are concerned, that event marks the final triumph of the violent or military section of the Puritan party. Henceforth Cromwell had to contend, not with the Cavaliers and their swords, but with members of his own party, whose weapons were their tongues and their pens, foremost of whom was Lilburn. Lilburn, as we have seen, took no part in bringing about the death of the king; "though holding that he deserved death, he (Lilburn) thought that he ought to be tried by a Jury instead of a High Court of Justice." The year 1649 is a memorable one in English history—a true *annus mirabilis*. Like the years 1066, 1588, 1688, and 1815, it impresses itself on the memory. Apart from its tragic opening, it was a year of great importance in other respects. It was the year in which Cromwell stormed Drogheda in Ireland, and in which Lilburn was tried in England. For a full account of the stirring events of that year the reader is referred to the pages of the late Professor Gardiner's *History of the Commonwealth and Protectorate*, where the story is admirably told, with a wealth of knowledge and accuracy of detail, with a simple eloquence and rigid impartiality, which will probably never be surpassed.

Lilburn and his followers were quick to see that the death of the King meant nothing more nor less than a military despotism. Referring to the so-called Levellers, who first appeared about 1647, Mrs. Hutchinson, the wife of the well-known Puritan leader and Regicide, in her *Memoirs* of her husband (p. 275) says of them: "They were men of just and sober principles, of honest and religious ends, and were therefore hated by all the designing, self-interested men of both factions," and "these were they who first began to disclose the ambition of Lieut.-Gen. Cromwell and his idolators, and to suspect and dislike it." The King's death following hard upon Pride's Purge,<sup>1</sup> confirmed this suspicion, and Lilburn and those who thought with him at once began a strong agitation against this military domination. "Of this agitation," says Professor Gardiner, "Lilburn was the heart and soul" (*Hist. Commonwealth*, Vol. I, p. 34). "On the 26th February, 1649, within a month after the King's death, he presented to Parliament a remonstrance which, however, was only partially drawn up by himself. This was afterwards published under the striking and self-explanatory title of *England's New Chains*. It was "mainly an attack on the Council of Officers," which, it was asserted, "ruled the State." On March 24th, 1649, Lilburn published a pamphlet, entitled *The Second Part of England's New Chains*. • This was a much stronger attack, not only on the Council of Officers, but also upon the Members of Parliament, who were accused of weakness and of being coerced by the officers. The Members of the sitting Parliament were urged to rise against the domination of the army, and an appeal was made for a New Parliament. The authors of this pamphlet were Lilburn and three friends, named Walwyn, Prince and Overton. On the 27th March, Parliament declared the pamphlet

<sup>1</sup> December 6th, 1648. In the first part of this Article, by a printer's error, uncorrected, this date was given as 1641.



to be "seditious and destructive of the present Government; to tend to mutiny in the army, and to hinder the relief of Ireland by raising a new war in the Commonwealth" (Gardiner, Vol. I, p. 37), and ordered that its authors should be proceeded against as traitors. Accordingly they were all four arrested the next day (March 28th), and brought before the Council of State. Although Bradshaw assured Lilburn that the Council claimed no jurisdiction over him, Lilburn threatened the Council with the consequences of committing him to prison. After their removal from the room Cromwell used strong language: thumping the table, he said, "I tell you, Sir, you have no other way to deal with these men but to break them, or they will break you." In the end all four were committed to the Tower to await their trial, and bail was refused.

On the 2nd April, 1649, a monster petition bearing, it is said, 80,000 signatures, was presented to Parliament praying for the release of Lilburn and his associates, and urging that no one should be condemned except for some definite breach of the law. In consequence of this petition, on 11th April, Parliament ordered that the four prisoners should be prosecuted without delay. Another petition was presented on their behalf on the 18th April, and yet another on the 23rd April, by a large number of women, who were told "to go home and wash their dishes."

A much more serious matter was that a mutinous spirit had begun to manifest itself in the army. On the 17th April four regiments were chosen by lot for service in Ireland. A large number of soldiers, three hundred in one regiment, threw down their arms and refused to go unless the demands of the Levellers were granted. They were promptly cashiered. On April 24th another regiment (Whalley's) mutinied. This mutiny was suppressed, and six of the leaders were condemned to death; but only one (Robert Lockyer) was actually executed. His funeral on

the 29th April, says Prof. Gardiner, "was made the occasion of a remarkable demonstration of civilian sentiment," and he was regarded by his admirers as a martyr.

On May 1st, Lilburn, who still continued to write in spite of his imprisonment, issued another version of the *Agreement of the People*, the manifesto in which the Levellers had formulated their demands. In this pamphlet he set forth his principles of reform and government, including annual elections, manhood suffrage, and complete religious liberty. No practising lawyer was to be elected a Member of Parliament, and no member of one Parliament was to be capable of sitting in the next. On May 2nd still another petition was presented to Parliament praying for the release of the four prisoners; and on May 6th there was another mutiny, of a very serious character, at Salisbury and Banbury, involving several regiments. Some fear of a rescue seems to have been entertained; but Cromwell took prompt measures to avert the danger. The Tower was occupied by four hundred soldiers who could be trusted, and on May 9th Parliament ordered "that no one should have access to Lilburn and his three companions except their wives, children, and servants." Three days afterwards even this relaxation was forbidden, and for upwards of two months, *viz.*, until July 18th, they were kept in close confinement. At his trial Lilburn drew a pathetic picture of his imprisonment during this period. "For after all this they caused me to be lockt up close Prisoner in the heat of Summer, set Centinels Night and Day at my Door, denied me the access of my Wife and little Babes; for a certain Season neither Wife nor Child could so much as set their Feet within the Gates of the Tower to see me or comfort me in my Distress." (*Lilburn's Tryal*, p. 120.)

Meanwhile, on May 11th, Cromwell and Fairfax set out with 4,000 men in pursuit of the mutineers, and ultimately overtook them at Burford in Oxfordshire. The attack was

made at midnight, and after a few shots four hundred of them surrendered; the rest escaped under cover of night. A Court Martial was held and three of the mutineers were executed. Another mutineer, William Thompson, was shot dead near Wellingborough, and with his death on May 17th the Levellers' rising came to an end. In May, 1694, a somewhat dishonourable attempt was made to provoke Lilburn to treasonable action by inducing him to throw in his lot with the mutineers. A man named Tom Verney was employed for this purpose, but Lilburn was too wise to be drawn into the snare.

On February 6th, 1649, a resolution of the House of Commons declared that the House of Peers was "useless and dangerous and ought to be abolished;" and on February 7th, by a further resolution, the Kingship was abolished. By an Act of Parliament dated the 14th May, 1649, a new form of treason was created. It was made treasonable for civilians to stir up mutiny in the ranks of the army. Soldiers stirring up mutiny could always be dealt with by martial law. This, as Professor Gardiner observes, was the only extension of the great Statute of Treasons of Edward III since the reign of Henry VIII. Another Treason Act was passed on the 17th July, 1649, which is not mentioned by Professor Gardiner. Both these Acts will be referred to more fully hereafter.

Notwithstanding the order of Parliament of April 11th, there was an unaccountable delay in bringing Lilburn and his three associates to trial, which can only be explained by supposing that the so-called Parliament was afraid of popular clamour. Perhaps also they thought that by keeping Lilburn in close confinement they had silenced him. If so they were grievously mistaken. Somehow or other he managed to procure writing materials in the Tower, and on the 8th June he published *The Legal Fundamental Liberties of the People of England, revived, asserted, and*

*vindicated*, which Professor Gardiner describes as "a long rambling production in which, after vindicating his own conduct, he denounced Cromwell and his principal officers as having established a despotism by means of Pride's Purge." (Gardiner, Vol. I, p. 79.) Strange to say, after this, on July 18th, he was liberated on bail. The reason of his liberation, however, was the serious illness of his wife and children. Two of his children died. On August 10th he published another pamphlet which he had also written in the Tower (having completed it on July 17th), entitled *An Impeachment of High Treason against Oliver Cromwell and his Son-in-Law Henry Ireton*. This pamphlet was full of violent personalities, and boldly asserted that in exceptional cases it was lawful to take up arms against a tyrant, the tyrant in question being, of course, "the pretended Saint Oliver, whom the present army had set up as their elected King." On August 20th Parliament issued a warrant for the re-apprehension of Lilburn, and the seizure of his books and papers, but the soldiers charged with the duty, terrified by the violence of Lilburn's language, failed to carry out their orders. On September 1st he published another small pamphlet, entitled *An Outcry of the Young Men and Apprentices of London*, of which Professor Gardiner says, "it was more audacious than those which had preceded it." This tract purported to be the work of ten apprentices, and Lilburn's name did not appear upon it, but it was well understood who was the author. "It was a mere incitement to the soldiers to rise in vindication of the *Agreement of the People*, and to show by their actions their sympathy with the martyrs of Burford." (Gardiner, Vol. I, p. 181.) It was in fact directed to the private soldiers of the Army. Its publication was almost immediately followed by a mutiny at Oxford. Discipline was, however, restored by the personal influence of Ingoldsby, the Governor. The issue of the last-mentioned pamphlet

was the immediate cause of his prosecution, as the Council of State suspected a combination between the Royalists and the Levellers, and were very much alarmed. On September 11th the "Contrivers" of *The Outcry of the Young Men* were ordered to be prosecuted. On September 13th, however, Lilburn published another pamphlet, in which he "assailed Sir A. Hazelrigg with extraordinary virulence, and published the letters in which Tom Verney had attempted to lure him into treason." (Gardiner, Vol. I, p. 183.) He was brought before the Attorney-General, Mr. Prideaux, on September 14th. On the same day he handed to Colonel Francis West, the Lieutenant of the Tower, a paper or small book, entitled *A Salva Libertate*, which he afterwards disowned; and on the 19th a warrant was issued for his committal to the Tower, but it was not actually executed until the 27th. On October the 13th the Council of State, being advised by Mr. Prideaux that they had ample evidence to secure a conviction, directed a special commission to be issued for his trial. Mr. Prideaux's opinion was, that "as well by the old established laws, as by the new ordinances, Lilburn was guilty of High Treason, and had forfeited his life, if he were prosecuted in any Court of Justice." The date finally fixed for the trial was October 24th. At the last Lilburn seems to have had some misgivings as to the result of the trial, and offered to emigrate to America, provided certain moneys due to him from the State were paid, but this offer was not accepted by his opponents.

Having sketched thus rapidly the events which preceded and led up to the trial of Lilburn in 1649, let us now turn to the technicalities of that trial.

G. GLOVER ALEXANDER.

(To be continued.)

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## VI.—CURRENT NOTES ON INTERNATIONAL LAW.

### Brazil and Germany.

A POSSIBLE cause of disagreement between Brazil and Germany has been met in the only satisfactory way, by a prompt expression of willingness to make a full disavowal and reparation. A party from the German ship *Panther* is said to have landed in plain clothes at Itajahy, a small town in Brazil, and to have seized an alleged deserter, one Steinhoff, whom they carried on board and detained. The real facts of the incident are obscure, but the German Government has instructed its representative at Rio to state that if any violation of Brazilian territory has really taken place, it is ready to admit the impropriety of the acts of its officers. It is semi-officially announced that Steinhoff was never taken on board: but that certain of the *Panther's* crew who had been instructed to ascertain "in an unobtrusive manner" the whereabouts of a deserter had "exceeded their instructions." The German Government is understood to have expressed its regret for this: but it might be well if it would instruct its representatives generally to refrain from "unobtrusive" deserter hunts in foreign jurisdictions for the future.

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The only serious thing about this trivial affair is that any such action on the part of a man-of-war belonging to a civilized Power, as was at first alleged, should be regarded as possible. In this Magazine, seven years ago, the writer deprecated the unfortunate tendency displayed of late years to disregard the paramount importance of not tampering with the keystone of our international system—territorial sovereignty. There have been far too many little invasions of territorial right lately. At their most superb pitch of dictatorship, the Holy Alliance did not forcibly occupy

Levantine islands or Spanish cities. Forcible intervention meant war in those days. Occupations of Corinto, beleaguements of Crete, marches to Pekin, seizures of Mitylene and Lesbos—all these things mean so many splinters recklessly chipped from the keystone of the arch. It is not so easy to stop the work of destruction as it is to initiate it.

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### **Occupation of Foreign Territory.**

We have just lately been face to face with a glaring instance of this kind of illegitimate pressure. The Christian powers, rightly or wrongly desiring to enforce a scheme of Macedonian rule on Turkey, have occupied Mitylene, and threatened to occupy Smyrna and to blockade Constantinople. That this is an essentially anarchic measure, and subversive of all settled intercourse between States as we know them, is not difficult to see. Its probable immediate effect will be to consolidate and clarify Turkish national sentiment, just as the high-handed "blockade" of Greece in 1886 raised the national sentiment of that country to such a pitch that the war of 1895 became an inevitable necessity.

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A State, as a subject of International law, is an organic entity whose life is bound up with its territory. If the security of that is touched, however lightly, the whole life of the organism is instantly threatened. In war, such gashes and wounds are justified by their mutuality. War is a legalised fight to the death between two of such organisms. The Power which goes to war takes risks and accepts embarrassments. But the pretension to treat nations as low-grade organisations, from which a piece can be temporarily lopped off, as a measure of friendly persuasiveness, without deadly injury to the whole body, is a notion which cannot be too strongly denounced.

"*Je ne puis pas concilier*," says Hautefeuille, most properly, "*l'idée de paix et d'amitié avec celle du blocus*." The seizure of a town is no less irreconcilable: and the act of a Turk who should—always taking care not to disturb the friendly relations between the Porte and the Powers—torpedo the allied squadrons, could hardly be said to be irregular.

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It is matter for congratulation that the allies have not proceeded by way of so-called "pacific" blockade. The flagrant illegality of their proceedings is more conspicuous as things are. So obviously unlawful a measure is not likely to be invoked as a precedent: whilst a half-respectable procedure like "pacific" blockade might have gained somewhat in reputation by being adopted. Common-sense says that the Powers have been at war with Turkey, although they were careful to set limits to their warlike acts. You cannot capture another State's towns and islands, and remain in a state of perfect peace with it, however passive it may be. It is only the obvious inconveniences of admitting the fact which make them desirous of calling their violence by another name. *Bellum gerunt, appellant pacem*.

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### **International Maritime Committee at Liverpool.**

In August last mention was made in these notes of the Conference of the International Maritime Committee held in June at Liverpool. There is now in our hands the full Report of this Conference. The members of the Committee are chosen from among those of the various Maritime law associations by a process of selection by nations, and constitute an exceptionally powerful body of persons skilled in the law and practice of shipping business. Mr. Justice Kennedy, than whom no more appropriate president for a Liverpool legal conference could be suggested, occupied the chair; and the principal subject of discussion was the limitation of ship-owners' liability. It may be



remarked that the duration of such conferences is necessarily so short, that the wisdom is apparent of discussing a very few subjects only. It is only in this way that a full and satisfactory interchange of ideas can be secured. At Liverpool, a resolution was presented in favour of the British Government's abandoning its attitude of aloofness to diplomatic conferences, and of its taking official part in the Brussels conference on Maritime law. As readers of this Magazine are aware, Mr. Justice Phillimore read, three years ago at Antwerp, a paper deprecating the government's inveterate unwillingness to take part in such preliminary discussions of policy. The present resolution was the occasion of much repeated approval of the arguments for urging the government to change its attitude. It was adopted unanimously by the British members of the Committee; and it is satisfactory to know that it is likely to produce effect.

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### **Maritime Lien and Priorities.**

The question of maritime liens and their priorities was also discussed at some length: but without disclosing much more than the fact that fundamental differences between the points of view of the different States existed, which rendered the possibility of a rational agreement on a common basis somewhat remote. The only hope seemed to lie in an arbitrary compromise. Broadly speaking, the Continent does not show the same favour as Great Britain to those who have sustained damage by collision; nor to those latest claimants in point of date, who have enabled the ship to proceed safely on her voyage, and have thus made it possible that a *res* should exist for anybody to claim against. Nor is it inclined to fall in with the English idea, that a contractual claimant must be regarded with some comparative disfavour, as having contracted on the security of what he knew to be a risky adventure. The

Continent regards him rather as having contracted in reliance on the security of a ship, to which his claim can attach in priority to those of later claimants, irrespective of what may happen to it in the future. Without criticizing these tendencies, which are, besides, subject to many cross-currents of opinion, it is easily seen that they are not easy of reconciliation. Mr. G. G. Phillimore presented to the Committee an exhaustive summary and analysis of the English law of maritime lien, which may be recommended to the perusal of all who have occasion to make themselves acquainted with this intricate subject.

### Limitation of Liability.

But the real work of the Committee at Liverpool was concerned with limitation of liability. It need not here be attempted to explain the English law limiting a ship-owner's liability. As is well known, it is subject, in certain cases of damage or loss, to a statutory limitation of £8 per ton (or, in particular circumstances involving life, £15). Under the law prevalent in most parts of the Continent of Europe, an owner may in some cases be liable to pay less, sometimes more. His liability is measured by the value of his ship at the end of her voyage. If the cause of action was a collision, in which his ship has been sunk, he pays nothing. If, under similar circumstances, his ship is an 8,000-ton liner, worth £40 or £50 per ton, and sustains no damage, he may have to pay £320,000 or £400,000, instead of £64,000.

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There are three ways of looking at the owner's liability for damage done by his ship. In the English view the owner is absolutely responsible for the fault of his servant, the ship-master. It is by special grace, and in recognition of the crushing liabilities which might otherwise be entailed upon him, that parliament has limited his liability to an

amount varying directly with the size of his ship, and more or less commensurate, therefore, with his ability to pay it. In the French view, and in that of most countries dominated by the Roman system, the owner is not liable at all for damage caused by the acts of somebody else, whether those acts were done by his servant in the course of his employment or otherwise. All he is bound to do is to surrender the instrument of the damage. *Noxæ deditio* is thus the foundation of the claim against him: and he can satisfy it by noxal surrender. It may well be that, historically, the English and Roman theories alike arise from the instinct of primitive people to exact vengeance on the thing or the slave which has injured them, just as the child hits the piece of wood against which it has fallen. The legal theory, however, has diverged in the manner stated, and the French owner abandons his wreck to the victim of its bad navigation, whilst the English owner pays a claimant whose costly vessel his own has sunk, £320, because it was only a 40-ton yacht that did the damage.

There is a third view—the German. Dr. Sieveking expounded it at Liverpool in a way which leaves little doubt that it has no application to the conditions of modern times. The ancient German, he said, freighted his ship and sailed away with it, or let it depart to sea; and thereupon all connection between it and the shore ceased. If it ever came back, bringing profit, well and good. But meanwhile, it and its crew were severed from their society. They were flotsam tossing on the waves, or else *imperia* in the foreign or domestic *imperium* of a strange harbour. They constituted an adventure *per se*. If they did damage, let the injured party make what he could of them. He need not think to put responsibility on their owner.

Quaint and archaic as this conception is, it is worth considering whether it does not afford a key to a better

solution of the problem of limitation than those which are generally put forward. Why, may we not ask ourselves, should an owner be liable at all? Roman and English rules alike are based on a quite irrational *deditio* of the offending object by the innocent possessor. What reason can be given why this liability, sentimental in its origin, should be imposed on him? Two replies might be given:—(1) "To make him an insurer of his servants' skill and carefulness." (2) "Because he gets the profit of their services, and should sustain the losses they occasion." Until it is demonstrated that owners are unlikely, in their own interests, to appoint skilful and careful masters, the first answer is not entitled to much weight. The second is only an irreflective application of a maxim—" *Qui sentit commodum et onus sentire debet*,"—to circumstances which it does not fit. The admitted propriety of a person who has entered into a joint adventure with another, sharing the loss as well as the advantage of it,—the equal propriety of a purchaser, who gets the advantages of appreciation in the price of the purchased article, bearing the risks attaching to it, do not touch the case. We have here, not a case of damage done to the owner by the acts of his servant, but a mere case of wrong as between the ship-master and a third party. The fact that the wrongdoer is the owner's servant is no more than a dramatic circumstance.\* If the employer were to be morally liable for the losses the servant occasions, as well as for the profits he earns, the logical conclusion would be that the employer must make good all the losses sustained by his trade rivals owing to the superior skill and discernment of his own servants. If to avoid so absurd a result, we limit the operation of the maxim *Qui sentit* to damage illegally caused, we destroy its *raison d'être*, and wrest it from its original application. Mr. W. A. Williams (Standard Marine Insurance Co.), in fact, boldly proposed at Liverpool the abolition of the owner's liability. His contention was that

insurance was sufficient to protect risks. On such a ground, the principle was obviously open to attack; insurance premiums would become intolerably heavy, unless the principle was inherently a sound one. Whether it is not so, may be worth consideration. The present law is based on exploded ideas, in France, Germany and England alike.

The draft treaty, as provisionally approved, gives the ship-owner the option of adopting either the English or Continental principle, as may be most advantageous to himself. It includes in the limitation, claims on account of loss or damage to the cargo; and apparently, this includes claims *ex contractu* on bills of lading whereby the owner has agreed to carry safely. It applies to damage to quays and the like (this the United States' representatives were adverse to), and it fixes the end of the voyage as the period at which the amount of the limitation is to be ascertained. Mr. Acland, K.C., moved an amendment, enabling an earlier period to be secured by a claimant who takes the trouble to arrest the ship. This view remains to be considered by the sub-committee: there is a strong feeling in France in favour of the principle, "one voyage, one risk." The ship-owner's liability, of course, extends beyond the ship to the freight, and any indemnities which may be due to the ship in respect of general average, collision, etc.

Considerable doubt was expressed by Mr. Carver, K.C., and others, as to the propriety of including in the limitation contractual claims arising out of the acts of the master. As originally drawn, the draft treaty applied to all cases in which the owner was liable for the acts of his master and crew. This was accordingly restricted (almost in the language of the Merchant Shipping Act, 1862, sect. 54) to cases of acts causing damage or loss to material objects: (1) on board the

ship; (2) on board other ships (provided there was improper navigation by the owner's ship); (3) on shore [*scil.*, when done by the ship]. It was felt that, otherwise, there would be little hope of inducing the British Parliament to accept the legislation necessary to give effect to such a treaty.

### Lex Loci Delicti.

The law of Scotland philanthropically grants a *solatium* to certain relatives for the death of a person by the fault of another, without the necessity of showing pecuniary damage. Has a foreigner, or a domiciled foreigner, the right to this *solatium*? The question would seem unarguable; but in *Convery v. Lanarkshire Tramways Co.* (Sc. L. T. Rep., Vol. 13, p. 512) it was apparently urged that the rights of a father in respect of his son were matters of *status*, and regulated accordingly by the law of the father's domicile, which in this case was the law of Ireland and gave no such claim for damages independent of pecuniary loss. The First Division repelled the contention. The Lord President, declaring the general applicability to delictual claims of the *lex loci delicti*, observed that the only shadow of authority for the contention of the defendants was a case of *Kendrick v. Burnett* (25 R. 82), in which Lord President Robertson had held that *solatium* could not be claimed by Scottish relations of persons killed in collision by an English ship. That was an entirely different case. It was practically equivalent to a suit for *solatium* on an act done in England—since, as Lord Robertson explained, the true view of a collision between ships of different nationalities is that which was stated at Antwerp in 1885, viz., that the laws of both countries must concur in giving a claim. But in *Convery's Case*, there was an action in Scotland on an act done there. The question of *status* had no bearing on the question, except to establish the legal relationship, had it been called

in question. Had the tramway company disputed the legitimacy of the deceased, no doubt the law of Ireland, and not of Scotland, would have been applied to decide the point.

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### Foreign Quasi-Contract.

Another case, raising the question of the incidental consequences of domestic *status* in different jurisdictions, came up in the Bloomsbury County Court (L. T., p. 160) on Nov. 15 and 30, 1905. The Parish Council of Edinburgh claimed seven pounds twelve shillings from a domiciled Englishman in respect of the maintenance in the poor-house of his mother, domiciled in Scotland. Bacon, C.C.J., observed, that "It was clear that the law of the place of domicile could alone be applicable;" which seems by no means so obvious a proposition as, with deference, he considered it. He treated as essential certain provisions of the Scottish law as to necessities of procedure, which is usually thought to be a matter exclusively regulated by the *lex fori*; and gave judgment for the defendant, Kirk. Quasi-contractual claims such as these are properly treated, in Westlake's view (sec. 235), according to the law of the place with which the obligation has the most real connection. This would seem to be Scotland. Plaintiffs' counsel relied to some extent on the existence of a similar liability in England: this was unnecessary, as the claim was not founded in delict, but on a claim for aliment by the parent, transferred to the Plaintiffs by operation of law. (*Parish Council of Edinburgh v. Kirk.*)

### Foreign Charities.

In *In re Vagliano* (L. T., Dec. 16, 1905, p. 152), Buckley, J., directed a scheme for the administration of a charity of large amount (£500,000), under the terms of a will which directed trustees, two of whom resided in England and the

third in Marseilles, to apply the fund for charitable purposes in Cephalonia. It was specially directed by the deceased that the securities representing the fund were to be lodged at a certain bank, and that the bank was to have all powers of investing and re-investing it, free from interference by the trustees. This practically made the bank the trustees of the capital, so that, if the matter had been the administration of a private trust, the Court could hardly have refused to entertain it. The case is different with regard to public charities. Brougham, C., once remarked<sup>1</sup> that the objection in an ordinary case to administering a foreign charity under the superintendence of the Court was, that those who are engaged in its actual execution are beyond the Court's control, and those who are within the jurisdiction are answerable to the Courts for the acts of persons whom it cannot assist them to influence. But in the present case, it was thought that the control was sufficiently real to afford a ground of distinction. It is difficult altogether to share this view. The cases in which the trustees were definitely marked out as foreign by the founder of the charity,—French municipalities, Scottish kirk-sessions, and the like,—were not, it is true, precisely in point. But the reason given by Brougham—the difficulty of controlling the administration of assets abroad—was still applicable; even though the administration must be of interest merely. Although the income had to pass through English hands, it must be practically dealt with in Greece; and in every case of this kind the fund is in England in the first instance. It is the ultimate allocation, and not the immediate destination of the money, that makes it difficult for the English Court to interfere. The Court retains hold of the purse-strings, but it cannot know all the details of administration.

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<sup>1</sup> *Lyons v. E. I. Company* (1 Moo., I. A. C. 293).



### Separate Domiciles of Married Persons.

In *Bertin v. Bertin* (*Times*, Nov. 7, 1905), a principle was applied in a matrimonial case, which has of late years been fully recognised as law, although no decision can be cited precisely in point. The wife of a domiciled Englishman who is deserted by him, is admitted to sue for a divorce, even though he has subsequently acquired a foreign domicile. It may be that she retains her English domicile: or it may be that the deserter is not allowed to plead his own fraud in order to make her position more difficult. In *Bertin v. Bertin*, it seems indisputable that the delinquent's domicile had been English. He and his wife were French; the latter came to England in 1890 (being then 27), and the former in 1892 or 1893. The marriage was in England in 1894, and the desertion in 1903. The respondent had permanent employment under the Post Office, had "expressed his intention of remaining in the country," and the wife had bought a leasehold house in London on the strength of his intention. Shortly before leaving her, to resume his domicile of origin in France, he had also expressed some intention of becoming naturalised, in order to be entitled to a pension. *Armstrong v. Armstrong* (L. R. [1898], P. 180) was not a case of divorce. In *Santo Teodoro v. Santo Teodoro* (L. R. [1876], 5 P. D. 97), the defendant was domiciled abroad throughout: whilst in the older cases the wife's British nationality had weight, so that the point is formally new.

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### Extra-territorial Service.

In *Mutzenbecher v. La Aseguradora Española*,<sup>1</sup> the question arose as to whether a particular contract was one which ought "to be performed within the jurisdiction." It was a contract of agency, and although the plaintiff's part was to be performed in England, no part of the defendant's

<sup>1</sup> *Times*, Dec. 20, 1905.

duty was to be actively carried out there. Phillimore, J., (affirmed by Collins, M.R., and Gorell Barnes, P.) declined to set aside the writ, holding that, although the defendant company had no active duties in this country, they were bound not to interfere with the agent's performance there. A wrongful dismissal, especially when carried out by another agent sent here *ad hoc*, was a breach within the jurisdiction of a contract which ought to be performed there. In *Holland v. Bennett*<sup>1</sup> (where the dismissal was by letter), Vaughan Williams and Mathew, L.JJ., came to an opposite conclusion: and the House of Lords decision in *Comber v. Leyland*<sup>2</sup> points in the same direction. *Rein v. Stein*<sup>3</sup> does not apply, as in that case the defendant was under a duty to pay money in this country. *Boni judicis est ampliare jurisdictionem*, but the recent decision seems inconsistent with the doctrine of *Comber v. Leyland*. The obligation to refrain from dismissing the plaintiff was an obligation which could have been entirely performed in Spain, and not necessarily in England. Lord Herschell's speech in *Comber v. Leyland* is much in point.

### South American Freedom.

The Monroe doctrine, as Monroe enunciated it, was designed to secure freedom. As put forward by his successor of the present day, it looks very much like an engine of despotism. Directed against the subversion of free institutions in America by the aggressive counter-revolution of 1824-25 in Europe, it is now represented as an excuse for the coercion of the free Republics of America by the United States. The President is good enough to concede to certain American States (which he does not particularise) that his country is ready to meet them on an equality. Whether this is a compliment or not, he leaves

<sup>1</sup> L. R. [1902], 1. K. B. 867.

<sup>2</sup> L. R. [1898], A. C. 524.

<sup>3</sup> L. R. [1892], 1 Q. B. 753.

it to be inferred that there are States in a less favourable position. No more arrogant claim could be made. A State is a State, and sovereign within its borders, if it be as small as Costa Rica and as misgoverned as Poland. Exactly what superiority the President would like the United States to assume, it is not easy to gather from the clouds of words in which he envelops his message. It seems that territorial acquisitions by a non-American Power—(it no longer need be a monarchical one)—are viewed with disfavour, and that however far wrong an American State may be, and however far wrong the President may think she is, the United States will guarantee her territory intact. Apparently, the President would not protect her, however right she was, and however right he might think she was, if no territorial aggrandisement were in question, even were her soil invaded. Except, that is, in one case. If the claim of the European nation is a purely contractual one, the President proposes to prevent its forcible interference. He recognises that this means that the United States must satisfy the claim, if it is just: and he proposes to set up a tribunal to examine its justice—namely, himself. If the defaulting State is right (*i.e.*, if the President thinks she is), the European State will have to fight the United States for her money. If she is wrong (*i.e.*, if the President thinks she is), the United States will stand aside.

It is probable that by “contractual” demands the message means demands for liquidated amounts. The breach of some contracts, *e.g.*, public treaties, is as grave a matter as a delictual wrong. This is left in doubt, and so is the exact course which the United States are recommended to pursue when an American State is wrongly attacked for an alleged delict. It is plain, however, that the President’s acceptance of the doctrine, “goes,” in the words of Calhoun, “infinitely and dangerously beyond Mr. Monroe’s declaration. It puts it in the power of other “countries on this continent to make us a party to all “their wars.”

"To lay down the principle that the acquisition of territory on this continent by any European Power cannot be allowed by the United States, would," says Woolsey, "go far beyond any measures dictated by the system of the balance of power, for the rule of self-preservation is not applicable to our case: we fear no neighbours."

Mr. F. Reddaway's short history, *The Monroe Doctrine* (Pitt Press), is a valuable compendium of the varied aspects which the doctrine has presented at different times. "Between politically controlling the southern States," he concludes (p. 151), "and treating them as entirely independent, there is no middle course, and the Monroe doctrine cannot find one."

It is satisfactory to know that the proposed arrangement, by which San Domingo was voluntarily to turn over the care of its finances to the United States, is likely to give place to some more self-respecting course on the part of the West Indian country: and still more satisfactory to know that there is a large body of the best American opinion which recognises that the new doctrine, whatever its recommendations, is not Monroe's doctrine, and that it is much less consistent than his with the character and dignity of the United States.

### Rule of the War of 1756.

"If, in the forgotten corners of the earth," says Dr. Walker, in *The Science of International Law*,<sup>1</sup> "there be any commercial operation which is forbidden to foreigners in time of peace, these foreigners can have no just ground for complaint should the opposing belligerent deny in time of war the privilege which the home State would in the hour of its exigency now accord." Unlikely as such an occurrence may have been, it has actually happened. A prize case of much interest has been decided

<sup>1</sup> p. 261.

by the Japanese Courts, practically on the ground of participation in a close trade. The United States steamer *Montara's* trade was to take out goods to Alaska and to return with seal-skins. The seal-skin trade was conducted with the special permission of the Russian government, and the Japanese Court appears to have held that this constituted an identification of the neutral with the belligerent.<sup>1</sup> It is plain that identification with the enemy would not naturally follow from a mere performance of peaceful trading service. The "Rule of the War of 1756" must be invoked. That rule was, indeed, based on this very ground—that the peaceful trader was identified with the belligerent by reason of relieving the latter from stress caused by the war. The evidence of this relief was the fact that such traffic was not permitted in time of peace. If, then, the voyage of the *Montara* was such as was normal and permitted prior to the war, the condemnation was wrongful, but not otherwise. The case of the *Australia*<sup>2</sup> was one of a ship actually chartered (in the view of the Court) to the Russian government or its agents. The mere fact of a foreign charter does not change the flag; the mere fact of a belligerent charter does not, *ipso facto*, make a ship confiscable. It is only when the chartered ship is under the physical control of the belligerent and employed in the furtherance of hostilities, or when she participates in the actual fighting, that condemnation might properly proceed. There seems to be little authority on the effect of a charter-party of this kind. Belligerents were formerly content to seize the cargo as enemy goods. Now they are obliged to attack the ship as being concerned in an illegal adventure, before they can touch the cargo. The Declaration of Paris has had several strange results, and this additional insecurity for the neutral vehicle is not the least remarkable.

T. BATY.

<sup>1</sup> *Times*, Dec. 22, 1905.

<sup>2</sup> *Times*, Dec. 23, 1905.

## VII.—NOTES ON RECENT CASES (ENGLISH).

*Mears v. Western Canada Pulp and Paper Co. Ltd.* (L. R. [1905], 2 Ch. 353), should be noted well by all company promoters and advisers of company promoters. Sect. 4 of the Companies Act 1900 requires that before allotment the whole of the application money should have been "paid to and received by the Company." In the above case, a new company having received cheques for all the application money, went to allotment. Subsequently two or three of the cheques were dishonoured, but these were at once made good by the underwriters. Held by Swinfen Eady, J., and by the Court of Appeal, that the allotment was not valid. All the judges held that the paying to and receiving by the company was a condition precedent to allotment, and the majority of them held that this condition precedent could be fulfilled only by the actual receipt of cash.

And *Lord Kinnaird v. Field* (L. R. [1905], 2 Ch. 361), should be noted well by pleaders. A defendant who counter-claims is not a plaintiff within Rule 2, Order XXXV, 1 R. S. C., and so has no absolute right, if his counter-claim refers to a cause of action within that rule, to have it or the whole action tried by a jury. In that case, in a Chancery action, the defendant counter-claimed for libel. The Court of Appeal, affirming the decision of Warrington, J., refused to send the whole case to the King's Bench Division, but in its discretion offered to allow the issue as to libel to be tried there.

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The powers given by the Settled Land Act 1882 are regarded by the Courts as beneficial, and are therefore construed by them very liberally. It is doubtful, however, whether Kekewich, J., in *In re Bruce, Halsey v. Bruce* (L. R. [1905], 2 Ch. 372), has not construed one of them a little

too liberally. Sect. 18 of the Act empowers a tenant for life to raise money by mortgage for "enfranchisement." Now what is meant by enfranchisement? Hitherto it has had in real property law a very different meaning—the conversion of interests in customary tenure into interests in freehold tenure. Kekewich, J., holds, however, that it also includes the purchase of the freehold reversion on a leasehold interest. This certainly does not convert the leasehold interest into anything. It extinguishes it by merging it in the larger freehold interest. There is no definition of enfranchisement in the Act, but when it is used in connection with any interest, that interest is copyhold (see, for instance, sect. 3 (ii)). And it may be noted that in the Conveyancing Act 1881, where a long term is changed into a fee simple by virtue of the power given by sect. 65 of that Act, the process is not called the "enfranchisement" but the "enlargement" of the long term.

We have often remarked how frequently almost the same point turns up at almost the same time in different Courts. Another example occurs in the Law Reports for November. In the *Lord Advocate v. Anna, Countess of Moray* (L. R. [1905], A. C. 531), the House of Lords held that where a Scottish heir of entail paid estate duty out of his own money, and died without taking any step to charge the settled estate with the sum so paid, sect. 9 of the Finance Act 1894 automatically created such a charge as between the successor to the settled estate and the deceased heir's personal representatives. In *In re Hole, Davies v. Witts* (L. R. [1905], 2 Ch. 384), where the committee of a lunatic who succeeded to realty paid out of the lunatic's personalty the death duties on the realty, Farwell, J., refused to decide whether on the lunatic's death that section gave his personal representatives a charge on the realty for the sum so paid. His lordship escaped so deciding by holding that even if it

did give such a charge this charge was primarily payable out of the surplus profits of the realty, and these had been much greater than was necessary for that purpose.

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In *In re Scholefield*, *Scholefield v. St. John* (L. R. [1905], 2 Ch. 408), a testatrix of French domicile executed her will according to French law. By it she appointed her niece universal legatee. She had a general power of appointment over funds in England. Kekewich, J., following *In re D'Este's Settlement Trusts* (L. R. [1903], 1 Ch. 898), held that this was not sufficient to execute the general power, since sect. 27 of the Wills Act 1837, which made a general bequest sufficient to do so, applies only to wills executed in accordance with that Act. Evidence was given that by the law of France such a bequest was sufficient to carry all property the testatrix could dispose of. But the learned judge, again following *In re D'Este's Settlement Trusts* (*supra*), held that the will must be read as part of the instrument creating the trust, and therefore construed by English rules of construction, and by these rules, independently of sect. 27 of the Wills Act, it would not execute the power. This may all be good law of a highly technical description, but the effect of it is that a will, which by English law executed the power, and which by French law disposes of all the testatrix can dispose of, fails to accomplish either object.

The authority which still attaches to Coke's works is well shown in *Bishop of Crediton v. Bishop of Exeter* (L. R. [1905], 2 Ch. 455). In the report of *Pigot's Case* (11 Rep. 26 b), it is stated as resolved, that if "an immaterial alteration in a deed is made by the obligee himself, the deed is nevertheless void." Now this was pure *obiter dictum*, since, in fact, the alteration there was made by a stranger; and moreover, in the only authority cited in support of the resolution (Dyer, 261 b), the alteration, though made by



the obligee, was very material indeed. Yet, notwithstanding, it is thought necessary to bring the point before the Court to have it formally over-ruled.

Note that one of several joint plaintiffs has no absolute right to settle with the defendants terms for himself and withdraw from the action: *In re Mathews, Oates v. Mooney* (L. R. [1905], 2 Ch. D. 461).

The executors' right of retainer is such an objectionable right that one is always pleased to find it defeated. That fate befell it in *In re Marvin, Crawter v. Marvin* (L. R. [1905], 2 Ch. 490). There the executrix of an insolvent estate was sued for a simple contract debt of the deceased's. She did not set up her right of retainer, nor plead *plene administravit*. Judgment was given for the creditor. Held, that the right to retain was lost. Unfortunately, in this case, it was the other creditors who suffered, as the executrix attempted to set up her right for their benefit.

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*Mercer v. Denne* (L. R. [1905], 2 Ch. 538) is most interesting, as showing how the Courts, by a liberal interpretation of a custom, can get round the doctrine that to be valid a custom must not have commenced within legal memory, *i. e.*, since A.D. 1189. There, an immemorial custom for fishermen to dry their nets on the defendant's land was proved. The defendant complained, however, that the fishermen dried their nets on his land after "cutching," and that "cutch" had been known in England only for eighty or a hundred years. The Court interpreted the custom as one "to dry nets at all times necessary or proper for the purposes of the trade or business of a fisherman." As drying them after "cutching" is now necessary or proper, this modern practice comes within the custom.

*Parker v. Talbot* (L. R. [1905], 2 Ch. 643) shows that the evil statutes do live after them. There the Court of Appeal was occupied for two mortal days listening to arguments on that sweet question, "What is a common lodging-house?" When counsel had exhausted their eloquence on the point, the learned lords justices reserved their judgments. Then they wrote their judgments, but nevertheless they reserved them still: for, after all their labour, it was discovered that there once had been a statute, now repealed, which had declared the meaning of the enigmatic term. Counsel again argued the point. But their lordships' minds could not be moved from the view that this repealed statute had declared the meaning the words were to bear in the living statutes which they were construing. Therefore it, being dead, yet speaketh. And the written judgments were consequently finally reserved till the day of judgment.

J. A. S.

It is part of the "extensive and peculiar" knowledge of the man in the street that a bequest of "plate" will not pass watches of precious metal, and therefore that watches are not plate. The Goldsmiths' Company have accepted his view for sixty-three years by taking no steps to bring within the Customs Act of 1842, as it would have been their interest to do, foreign watches imported into this country, for sect. 59 of the Act prohibits the sale of gold and silver plate until it has been assayed and stamped. Now, however, discarding his guidance, though without unseemly haste, they have in *Goldsmiths' Company v. Wyatt* (L. R. [1905], 2 K. B. 586; 74 L. J. R., K. B. 822) proposed to do so; but happily the man in the street was right, and the Court have decided that though watch cases of the metals would, if separately imported, be plate, a completed watch is not. A contrary decision would have caused a great deal of trouble.

As the rule is that when the Lands Clauses Acts are put in force the property to be taken is to be paid for at its value at the date of the notice, notwithstanding subsequent depreciation or the contrary, it follows that if the property is injured, as by fire for instance, before the settlement, the damage will be a risk of the intending purchaser. *Phoenix Assurance Company v. Spooner* (L. R. [1905], 2 K. B. 753; 74 L. J. R., K. B. 792; 93 L. T. R. 306) presents some points of interest in the application of the rule. A corporation had given the statutory notice, and shortly afterwards the property was burnt down. The legal owner received an agreed amount in satisfaction of his claim under a policy of the plaintiff company, and by this amount the corporation diminished the ascertained value of the property when it was intact, and handed him the balance with a guarantee against any claim which the insurance company might make. This guarantee the Corporation had to fulfil, for in an action for the return of the money paid under the policy, the insurance company was successful. If the company had rebuilt the premises, the corporation would have received full value on the purchase. But money having been paid instead, neither party to the conveyance could retain it. The vendor could not, because, a contract of insurance being one of indemnity, he could not show any loss, as he was entitled to what was the full value of the property before the fire. The corporation could not, because they had no right to avail themselves of money belonging to a stranger to the contract. But by a simple precaution the corporation could have placed themselves safely in the position which they were unable to maintain in the action.

As the Court of Appeal has ordered a new trial in the case of *Scarborough and wife v. Cosgrove* (L. R. [1905], 2 K. B. 805; 74 L. J. R., K. B. 892), there may be some chance of a decision being arrived at on the liability of the landlord of a

boarding house for the loss therein of his guests' luggage. At present the law on the subject is hardly in a settled state. The two cases of *Dansey v. Richardson* (3 E. & B. 144) and *Holder v. Soulby* (8 C. B., N. S., 254) are not reconcilable. The incidental comment of the Master of the Rolls on *Calye's Case*, 320 years and more after it was decided, is interesting, but it does not seem to go far enough.

The House of Lords, in *Sheffield Corporation v. Barclay* (L. R. [1905], A. C. 392; 93 L. T. R. 83) has shifted on to the bankers the liability which the Court of Appeal had, as noted *ante*, Vol. XXIX, page 227, placed upon the corporation. Where two strong tribunals have differed, it may without presumption be doubted whether the more forcible arguments are contained in the over-ruling decision.

The power of the Court to alter the language or construction of an Act, so as to avoid, in the words of Parke, B., in *Miller v. Salomons* (7 Exch. 546), "absurdity, inconsistency, or repugnance," has just been exercised in *Rex v. Vasey and Lally* (L. R. [1905], 2 K. B. 748). It would seem, but for the examples that exist, incredible that permanent public enactments that may curtail a subject's liberty (in this particular Act whipping may be one of the penalties), that are submitted to the triple deliberation of each House, and are finally brought to the King for his assent, have after all to be rescued from absurdity by a violent application of the common sense of a Court of law. A suggestive contrast is that a great morning paper, any issue of which is necessarily seldom referred to after the day of publication, brought to press in an exigent race with Time, is nearly always letter perfect, and in its important parts scarcely ever has a bewildering sentence.

In bankruptcy there are two or three noticeable decisions. *In re Cohen* (L. R. [1905], 2 K. B. 704; 74 L. J. R., K. B.

864) decides that the time for disclaiming onerous property of a bankrupt, runs from the date of the appointment of the trustee under sect. 21 of the Act, and not from the Official Receiver's appointment as trustee at the time of adjudication.

It is not often that creditors of a bankrupt forgive him his debts and withdraw their proofs. In *In re Keet* (L. R. [1905], 2 K. B. 666; 93 L. T. R. 259), however, where the assets were equal to twopence in the pound, they did so; but the Court decided that the position in which an insolvent so favoured was placed was not such as to entitle him to annulment, as payment in full would, and to the immediate right to resume his usual course of business without any danger of a term of suspension.

In *In re Wilkinson; Ex parte Fowler* (L. R. [1905], 2 K. B. 713; 74 L. J. R., K. B. 969) a contract for works to be done for an urban district council had a proviso, that if the contractor unduly delayed payment for machinery shown by the engineer's certificate to have been supplied to him for the works, the engineer could make direct payment out of the amount due on the certificate to the persons entitled. Bigham, J., held, that such an undue delay had been occasioned by the contractor being adjudicated bankrupt on his own petition, and that the machine makers were entitled in priority to the claim of the trustee.

T. J. B.

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### SCOTCH CASES.

Testamentary trustees in Scotland labour under a disadvantage which is not felt, at least to the same extent, in England. There is no definite machinery for judicially determining difficult legal points and freeing the trustees from personal responsibility and pecuniary loss. The action of multiplepounding (interpleader) is generally supposed to

meet the object in view, but this process, when raised by a trustee or other fiduciary, has of late been so often held incompetent for want of what is technically termed "double distress" that it has become practically valueless. The latest instance was *Macgillivray's Trustees v. Dallas* ([1905], 42 Sc. L. Rep. 791) where trustees raised an action of multiplepinding to determine a point connected with a specific legacy under the will. The Court held the action to be incompetent for want of double distress, because, although the parties interested had refused to grant a discharge of their possible claims, so as to permit of the trustees dividing the estate according to their own judgment, the beneficiaries interested had not made any definite claim or sought to interpel the trustees from dividing as they thought best.

An application of a rather unusual nature was made in *Browning's Trust* ([1905], 42 Sc. L. Rep. 825). At the request of trustees a judicial factor was recently appointed by the Court to take charge of the trust estate. On taking up his duties, the factor found that the estate included a large number of ordinary shares of a New Zealand Company of the face value of £9 each, of which only ten shillings had been paid. There was thus uncalled capital to the extent of £8:10s. per share, which in this case was nearly double the amount of the whole other trust funds. The factor found that he could only get rid of these shares upon a payment of £3 per share, and in these circumstances he presented a note to the Junior Lord Ordinary asking power, in view of a probable appreciation, to retain the shares for two years and thereafter for such period as the Accountant of Court should allow. The Lord Ordinary (Johnston) found the case one of unusual difficulty, arising chiefly from a doubt as to whether a judicial factor, coming in room of trustees, was entitled to come to the Court for instructions and powers in the same circumstances and to the same

effect as a *curator bonis* or a factor *loco tutoris*, who are more entirely the creatures of the Court's equitable jurisdiction. The view he favoured on the authorities was that a judicial factor who has superseded trustees is bound to act on his own discretion, in the same degree as the trustees whom he has replaced, but in the special circumstances of this case he thought the factor, even though he was a factor *vice* trustees under a settlement, was entitled to the direction of the Court as to the course he should follow. He therefore reported the cause to the First Division, who unanimously gave authority to retain the shares *hoc statu* and for no definite time. At the same time the factor was directed to communicate with the Accountant of Court in the event of any change of circumstances.

We note with satisfaction the reversal by the House of Lords of *M'Ewan v. Watson* (42 Sc. L. Rep. 837), the facts of which were stated in our issue of May last (Vol. XXX, p. 349). The Court of Session disallowed issues for the trial of an alleged slander based on the evidence of a medical man in the witness box, but they allowed the trial to proceed in respect of information given privately to the legal advisers of the party on whose behalf the evidence had been given. The House of Lords refused issues for trial in the latter case as well as in the former. The words of the Lord Chancellor (Halsbury), who gave the leading opinion, will carry general approval:—"It appears to me," he said, "that the privilege which surrounds the evidence actually given in a Court of justice, necessarily involves the same privilege in the case of making a statement to a solicitor and other persons who are engaged in the conduct of the proceedings in Courts of justice, when what is intended to be stated to a Court of justice is narrated to them."

In *Lord Advocate v. Earl of Moray's Trustees* (42 Sc. L. Rep. 839), opinions were given by the House of Lords on the application of an Imperial Statute to Scotland, which strongly corroborate previous utterances of the same House. Some time ago (Vol. XXIX, p. 100) we applied these older *dicta* to the vexed question of the application to Scotland of certain well-known Acts, such as the Gaming Acts and the Preferential Payments in Bankruptcy Act 1888. It is to be noted that Lord Macnaghten, who in the case of *Pemsel* (L. R. [1891], A. C. 531) gave an admirably reasoned judgment, has, after the lapse of fourteen years, given another on the same lines, and that he is now supported by Lords Halsbury, Davey, James of Hereford, and Dunedin; the only dissentient in the *Earl of Moray's Case* being Lord Robertson.

An interesting judgment affecting the legal status of a building society was given in *Cuthbertson v. Maxtone Graham* (43 Sc. L. Rep. 17). The constitution and rules of the building society in question were in a form very common in Scotland. The shares in the society were of £25 each, payable by monthly instalments of two shillings each per share. The voucher for payment of instalments was the member's pass book. In regard to instalments in arrear it was provided that any member failing to pay his monthly instalment should be fined one penny per month for every month such instalment was in arrear. Such fines might be liquidated from the first moneys paid in or deducted from the moneys already paid in; and it was further provided that when the moneys paid in or at the credit of the member were exhausted by fines, the said amount should then be forfeited to the society and carried to the contingent fund. An order having been pronounced for the winding up of the society, the liquidator presented a note for settlement of the list of contributories, and included therein a former member who



contended that his shares had been extinguished by fines. The party in question pleaded that by the forfeiture of his shares his connection with the society had entirely ceased, and that he was not liable for any further contributions. The Court affirmed this view; the Lord President making a valuable comparison and differentiation between a building society constituted as above mentioned and a company under the Companies Acts. "A share in a limited company is part of the capital and is something which cannot be got rid of. It may be transferred to someone else but it cannot be put out of existence. . . . . A share in this building society represented no proportionate quota of the company's capital. There might be as many shares in this society as people liked to apply for. The share here represented no more than an ear-marked application for a contribution of £25. The share might never come to maturity; it might be withdrawn long before it was matured. . . . . Though the word is the same, there is nothing more than a faint analogy between it and a share in a joint-stock company."

R. B.

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### IRISH CASES.

Contests between the Crown and a subject as to the ownership of foreshore usually involve only a lengthy discussion of the effects of acts of user, extending over a century or two, and throwing light upon the disputed construction of a Crown grant or patent. *Vandeleur v. Glynn* ([1905], 1 Ir. R. 483) is of this normal type, and, though an important case, contains no new principle. It is chiefly noteworthy for a concise summary (by Palles, C.B.) of the law as to attributing long-continued user to a legal origin, even as against the Crown. The points decided appear to be these:—(1) Where the Crown has granted a manor adjoining the sea, foreshore may form part of it, and may

therefore pass under the grant, even though the technical words for describing it (*littus maris* or something equivalent) be absent. (2) If the grant contains words under which some foreshore may pass, it may be shown by user that only a particular bit of foreshore did pass; and this is not disproved by the Crown showing that other bits of the foreshore adjoining the same manor did not pass. (3) If acts of user by the owners of the manor are "open, notorious, and long persevered in," then, although each separately would have been a trespass or an encroachment had the foreshore in question not passed under the patent, a legal origin will be attributed to the acts.

One notices so large a proportion of the cases on Death Duties described as cases of first impression, that one is led to picture the Inland Revenue authorities as standing "ready to strike once and strike no more," and never moving until sure of their ground. Two such cases under the Finance Act 1894 are found in recent numbers of the Reports. *Attorney-General v. Smyth* ([1905], 2 Ir. R. 553) turns upon the construction of sect. 2, sub-sect. 1 (c). The sub-section is an example of the irritating but apparently unavoidable method of legislation by reference. It makes liable to estate duty property which would have had to be included in an account under sect. 38 of the Customs and Inland Revenue Act 1881, as amended by sect. 11 of the Customs, etc., Act 1889, "in the same manner as if those sections were herein enacted and extended to real property, and if the word 'voluntary' were omitted." The sections referred to are found to deal with property taken under a [voluntary] disposition purporting to operate as an immediate gift *inter vivos*, not *bonâ fide* made twelve months before the death of the deceased. The question in the present case is whether the following facts fall within the sub-section. A father settles property on his son, on

the son's marriage; the son of course gives the father no consideration in money or money's worth; no estate is reserved to the father for his life or for any period determinable by his death; he dies within twelve months of making the settlement. The King's Bench Division hold that the interest which the father puts into settlement is liable to pay estate duty on his death. The transaction is, in short, a gift; and gifts made within a year of the donor's death are what the sub-section aims at catching. Since the word "voluntary" is so modestly removed from the Act of 1881, that which would be "a gift" in popular speech is apparently none the less a gift for the purposes of the sub-section, because a technical consideration of marriage makes the donee not legally a volunteer.

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The decision in the above case was "in accordance with the practice of the Inland Revenue Commissioners." That in *Attorney-General v. Cochrane* ([1905], 2 Ir. R. 626) was not, but it did follow what had been their practice for some ten years and had only recently been abandoned. It decided that, where a fund is settled (more than a year before the settlor's death) with a proviso that the income only up to a fixed amount is to be paid to the beneficiary, and the surplus income reserved to the settlor, estate duty is not payable at his death on the whole amount of the fund.

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The rather awkwardly-drawn sect. 1 of the Inebriates' Act 1898 came before the Court for Crown Cases Reserved in *Rex v. Meehan* ([1905], 2 Ir. R. 577). That section was intended to enable a criminal Court, where an offender is proved to be an habitual drunkard, to send him to an inebriates' home instead of or in addition to awarding him imprisonment. To do so, however, there must be: (a) a conviction of the prisoner for an offence specified in the

section, and (b) either his admission that he is an habitual drunkard or a finding of a jury to that effect. But the language of the section left it doubtful whether, if the offender was not, strictly speaking, convicted, but pleaded guilty to the offence specified, a jury could be empanelled to try solely the issue as to his habitual drunkenness. The Court in the present case decided that the section is *not* confined to cases where the offender is convicted by a jury of one of the specified offences, but applies also where he pleads guilty; and if he does not then admit being an habitual drunkard a jury may be sworn to enquire as to this. Another point decided by a majority of the Court is, it is submitted, more doubtful: namely, that in such case the depositions may be used as evidence to satisfy the Court that the offence in question was committed under the influence of drink.

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*Boyers v. Duke* ([1905], 2 Ir. R. 617), is noticeable as being an application of the principle of *Harvey v. Facey* (L. R. [1893], A. C. 552), to a contract for the sale of goods. That principle is that the mere quotation of a price and terms of business, in answer to an enquiry, is not an offer which the enquirer can turn into a binding promise by accepting it. The quotation is only an invitation to the other party to make an offer. In the present case, plaintiffs wrote to defendants: "Please give us your lowest quotation for canvas," describing it by reference to a sample enclosed, and enquiring as to time of delivery. Defendants replied: "Our lowest price is 4½*d.* per yard; delivery in 5 to 6 weeks." Plaintiffs replied ordering a quantity of canvas at the price mentioned. Held, no contract; the only real offer had been plaintiff's reply, and this had not been accepted.

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J. S. B.

## Reviews.

[SHORT NOTICES DO NOT PRECLUDE REVIEWS AT GREATER LENGTH IN SUBSEQUENT ISSUES.]

*The Law and Practice in Divorce and Matrimonial Cases.* By A. G. J. HALL, M.A. London: Butterworth & Co. 1905.

Mr. Hall has given his book a very unusual form. He has summarised the Law and Practice in a number of articles each of which is subdivided into a number of sections. These articles are placed in alphabetical order, and contain references to a chronological digest of cases on the subject which is appended to each article, to which there is also an index prefixed. A good selection of subjects, and a full system of cross-references, enable the reader to easily find the subject he may be in search of. The idea is well carried out, and the articles are carefully and accurately drawn. Every effort has been made to facilitate research, as besides the short indexes we have mentioned, there are no less than eight other indexes given at the beginning of the book, namely, Abbreviations: Cases Digested: Cases Cited: Rules and Regulations: Statutes Chronological: Statutes Alphabetical—these two refer to Statutes contained in Appendix A—Statutes cited: Forms. Appendix A contains the Statutes relating to Marriage and Divorce from 25 Henry VIII, c. 21, to 1 Edw. VII, c. 26; Appendix B, the Rules and Regulations; and Appendix C, Forms.

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*Records of the Borough of Leicester.* Edited by MARY BATESON Vol. III. Cambridge: The University Press. 1905.

The present volume, which completes the first series of Leicester Records, contains extracts from the Leicester Archives from 1509—1603, a most instructive preface, and is edited with the same learning and skill that Miss Bateson has shown in the previous volumes. The most important records as regards the history of the borough are the two Charters of Elizabeth of 1589 and 1599; and there is much information as to the financial operations of the two governing societies who formed the corporation, as to their purchasing rents from the Crown, levying rates, subsidies, loans; and of particular interest are the initial workings of the poor law. The governing bodies seem to have been in the habit of assessing themselves handsomely. There are many interesting entries as to the levying of musters, and the arming and equipment of the

soldiers. It was found necessary to conciliate the goodwill of the Huntingdons and other great men by constant presents of wine, etc., both to them and their wives. We find entries of "muskadyn," "clarret," "malmysey," "sack," "whyt wine," salmon, turbot, oysters, sugar lofes. There are also entries of presents to the judges, but these seem generally to have been in cash. There are numerous regulations of trade, and attempts to protect certain trades in the borough. We may mention a few items which we think may be interesting to lawyers. We find a showmaker bound over in the sum of forty shillings, with one surety in the same amount, "that he from hensforthe wolde not play at any tyme hereafter for money other at dyce, cardes or tables." In 1558 there seems to have been a question as to the validity of a deed in English. In 1569 it was directed that inquiry was to be made as to the "defalties and trespasses of common dronckerdes that do use to sitt typplynge at the aile houses all daye and all nyghte unthryftely, and their wyves and children almost sterve at home for lacke of good releffe and sustentacion." An interesting item is a lawyer's bill of costs in a plea of trespass on the case, where the usual attorney's fee seems to have been fourpence and counsel's and attorney's fees two shillings. The only other entry we have space to call attention to is a very interesting letter from the son of the Recorder to the Mayor in 1600, enclosing an opinion "under his owne hande" of Mr. Attorney, whose advice on the best way to support their grant of privileges was "that it was noe good comerce to deale with your straungers which sell by retail by any Exchequer shutes, in that he hathe bine privie that the chiefe Baron will favor youe nothinge therein, but rather sett priye espialls to take them raylinge of your charter or by disgrasinge your graunt, and soe to bringe them in to the Starre Chamber vpon some woordes, and there he will put in with youe."

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*A Digest of Equity.* By J. ANDREW STRAHAN, M.A., LL.B., and H. B. KENRICK, LL.D. London: Butterworth & Co. 1905.

The design of this work is somewhat different from most Equity text books. Instead of classifying the subjects with which Equity deals according as they come within the exclusive, concurrent, or auxiliary jurisdiction of the Court of Chancery, the two substantial divisions of the work are equitable rights and equitable remedies. These are treated of in a number of articles setting out general

propositions, with notes to each paragraph expanding, explaining and illustrating. The propositions have been drawn with great care and clearness, and the explanations and illustrations are excellent. We think the whole is very well adapted to give a student a clear and lasting impression of the main principles of Equity. A short account of the arrangement of the book will give some idea of its scope and method. After pointing out the differences between equitable and legal interests, the Authors divide equitable rights into three divisions. These are, first, Equities to protect confidences. This embraces the great subject of Trusts, and is the most fully worked out, as it is the most important part of the book, and takes up rather more than a fourth of it. It may be noticed that the Authors follow Mr. Underhill in adopting the name "declared" trusts in preference to the more common term "express" trusts. The second division is "Equities to promote fair dealing." This deals with the doctrines of "conversion," "election," "performance," mistake and misrepresentation, and fraud and undue influence. The third and last is entitled "Equities to prevent oppression," and deals with forfeitures, mortgages, etc. The rest of the work deals with equitable remedies, in which is included "Administration of Assets." We may call attention to a few of the Authors' opinions on debatable points. They consider the decision in *Phillips v. Probyn* "contrary to all principle." They object to the practice of citing authorities to show what amounts to reasonable care, prudence, etc., as "a misleading and dangerous practice." There is a valuable note explaining and qualifying the well-known phrase that "money is not ear-marked." They also consider, and we shall most of us be likely to agree with them, that "the decisions as to mistake are not very clear nor very easily to be reconciled." They also dissent from the usual habit of confining the expression of contracts of *uberrimæ fidei* to contracts of insurance, guarantees, and partnership agreements, and not only point out that many other classes of contracts should be included, but also show that a guarantee is usually not a contract *uberrimæ fidei* at all.

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*Encyclopædia of Forms and Precedents.* Vol. IX. Name, Change of,—Partnership. By ARTHUR UNDERHILL, M.A., LL.D., assisted by G. H. B. BOMPAS, C. O. BLAGDEN, W. E. C. BAYNES, M.A., LL.M., H. FREEMAN, M.A., and H. H. KING, LL.B. London: Butterworth & Co. 1905.

This valuable series continues to issue its volumes with com-

mendable regularity. It is still under the able general editorship of Mr. Underhill, but some of those who have assisted him in the preparation of the present volume seem to be different from those who contributed to the earlier volumes. A number of subjects are comprised in the book before us. Some, such as Change of Name, and Novation, are quite short, and the two longest are Parliamentary Documents and Partnership, which are contributed by Mr. J. W. Greig and Messrs. D. W. Pollock and G. H. Devonshire, and contain about 250 and 150 pages respectively. A very great number of useful precedents are contained in both, and the first is calculated to save persons concerned with Private Bill legislation a great deal of trouble and research. We have also noticed a valuable contribution of Forms and Notes on the subject of Open Spaces by Sir Robert Hunter; this is a subject on which he is a well-known authority. A compilation of the correct description of a great variety of Parties by Mr. W. A. Russell is likely to be generally useful, though there is a little slip in the reference in the note to the Courtesy title, which is XXII not XXIII. We might also call attention to an interesting collection of Forms on Naturalisation, etc., by Mr. Henriques.

*The Annual Practice 1906.* 2 Vols. By T. SNOW, M.A., C. BURNEY, B.A., and F. C. STRINGER. London: Sweet & Maxwell.

*The Yearly Practice of the Supreme Court 1906.* By M. MUIR MACKENZIE, B.A., T. W. CHITTY, S. G. LUSHINGTON, M.A., B.C.L., and J. C. FOX, assisted by P. M. FRANCKE, E. C. BLISS, M.A., and W. W. LUCAS. London: Butterworth & Co.

*The A. B. C. Guide to Practice 1906.* By F. A. STRINGER. London: Sweet & Maxwell.

All practising lawyers should be very grateful to the Editors of these invaluable books; and we do not attempt to decide which is the best. Every man must, and does get the one which suits him best, which is probably the one to which he is most accustomed. There are no very important alterations or additions to the present issues. The rules of October 1904, the rules of July 1905, and the Supreme Court Fund Rules 1905, all of which are of importance, will be found to have been added. We may call attention to the exhaustive treatment of the procedure in cases of Contempt, which will be found in the notes to Order 44 in the *Yearly Practice*. A useful addition to the same volume is the Table of Time for Appearance after Service out of the Jurisdiction, which must have



taken a considerable amount of labour. It is curious to note the different times allowed; they vary from ten days in Ireland, Scotland, and the more western parts of the Continent, to one hundred days in Australia and New Zealand. The time for Vladivostock varies from sixty-six days (summer) to seventy-eight days (rainy season).

The Editors of the *Annual Practice* have made serious efforts to diminish the bulk of their work by the deletion of "obsolete" cases and the condensation of notes, and have been able to make substantial progress in this difficult and laborious task without sacrifice of efficiency. A new departure, and one of which we thoroughly approve, is the dating of all new cases added. The notes to many important orders have been revised by such competent authorities as Mr. P. E. Vizard, Mr. E. Bray (now Judge Bray), Mr. B. D. Kilburn, Dr. Blake Odgers, K.C., and others. The Resolutions of the General Council of the Bar have been brought up to date. Two very useful collections in the *Annual Practice* are those of the Practice Notes on Taxation of Costs, and Practice Masters' Rules.

Mr. Stringer's *A. B. C. Guide* has been somewhat expanded and is as ever a useful little work of handy reference.

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*The Annual County Courts Practice 1906.* By W. C. SMYLY, K.C., and W. J. BROOKS, M.A. London: SWEET & MAXWELL.

Although in appearance only one volume, this work consists of two books in one. The merits and arrangement of Judge Smyly's work are well known to the profession, and there does not seem to be much new material to remark on. There are a few new rules but not of the highest importance. Perhaps the most important of these are the Rules of Procedure in cases where questions are referred to the County Court under the Licensing Act, 1904, s. 2, but it remains to be seen what class of questions will be referred under the section; and the opinion of the learned Authors is that probably only substantial questions of law will be so referred. Another increase of the Jurisdiction of County Court Judges is given by 5 Edw. VII, c. 10, which gives power to arrest a ship owned by persons out of the jurisdiction. As usual, a large number of pages is taken up with the consideration of Employers' Liability Acts, and we should have liked to have an opinion from Judge Smyly as to the increase or diminution of this class of action. We notice a prophecy of a block in the business of some of the Courts, owing to their work

having been increased by the operation of the County Courts (Jurisdiction Extension) Act 1903, without any assistance to dispose of the same having been provided by the Legislature.

*Encyclopædia of Local Government Law.* Vol. I. Accounts—Baths and Wash-houses. By J. SCHOLEFIELD. London: Butterworth & Co. 1905.

This large and handsome volume is the first instalment of a work of great importance and considerable difficulty, which contemplates embracing no less a subject than that of Local Government Law, excluding, however, Statutes relating only to the Metropolis and Poor Law. It does not aim at dealing with this in such detail as to dispense with the necessity of text books, but it "will have achieved its object if it gives to those interested in Local Government matters, in an accessible form, all the knowledge which is required for ordinary matters of every-day occurrence, together with such information as will simplify research in text-books upon more obscure or recondite points." The main topics are dealt with in separate articles arranged alphabetically. The idea of having an introductory chapter reviewing the whole system of Local Government was at first contemplated, but has been given up; and the subject-matter of such chapter will be found in Mr. J. W. Baines' article on the Areas of Local Government. We must not omit to point out that Mr. Scholefield has secured the co-operation of a number of contributors possessed of special knowledge of the subjects on which they write, such as, among others, Sir Ralph Littler, K.C., Mr. A. Macmorran, K.C., Mr. N. W. Mackenzie, and Mr. S. G. Lushington, in the present volume. Some of the most important articles so far seem to be those on "Accounts and Audits," by Mr. A. Hobbs; "Acquisition, Sale and Letting of Land by Local Authorities," by Sir Ralph Littler; "Act of Parliament," and "Appeals," by the Editor; "Adulteration," by Mr. F. Coltman, and "Areas of Local Government," by Mr. J. W. Baines. All these are thoroughly well done, and the work promises to be a very valuable one.

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*The Annual Statutes 1905.* By J. M. LELY, M.A. London: Sweet & Maxwell. 1905.

*Paterson's Practical Statutes 1905.* By J. S. COTTON. London: Horace Cox. 1905.

The year 1905 was not very prolific in legislation, and the number

of Statutes selected by our two Editors is twelve, and to his selection Mr. Lely has added the local London Building Act. The Acts selected are the same, except that Mr. Lely has chosen the Public Works Loan Act instead of the War Stores (Commission) Act, which Mr. Cotton gives. Mr. Cotton's little introductions are as good as ever, and so are his notes. Mr. Lely has printed a number of important Statutory Rules including the Education Code, the Licensing Rules, and the Rules and Regulations under the Unemployed Workmen Act, which constitute a very important addition to his Statutes. He also prints in an Appendix, the Tudor Act, "which prohibits the premature departure of Parliament men from Parliament on pain of forfeiture of their wages." We do not know why he has chosen this time to add it to the "Statutes of Practical Utility" as it does not seem very practical at present. Mr. Lely also once more suggests some reforms, such as the consolidation of the Burial Acts, the Death Duties Acts, the Solicitors Acts, the Summary Jurisdiction Acts, and the Parliamentary Election Acts.

*The Law relating to the Taxation of Foreign Income.* By J. BUCHAN. London: Stevens & Sons. 1905.

Mr. Buchan states the aim of his little book clearly enough in the prefatory note. It is "to collect the provisions of law specially relating to the Taxation of Foreign Income, both for the benefit of the practising lawyer whose work leads him but rarely into the domain of Revenue law, and of the business man whose investments and interests lie partly abroad." In a graceful preface, Mr. R. B. Haldane emphasizes the need of a scholarly and comprehensive treatise such as Mr. Buchan has produced, on a difficult and intricate subject, both to the legal profession and business world. This is high praise, and it seems to us well deserved. The book may be said to be divided into three parts. The first is an introduction of over 60 pages which discusses the historical antecedents of the tax; the structure of the system, where Mr. Buchan contends that the Taxation of Foreign Income in England is a serious code, economically sound and formably justifiable; its economic value, where he considers the effect of our system on foreign trade; and a very useful summary on the taxation of foreign income abroad. The second part deals with the income of residents in the United Kingdom derived from foreign sources. The third deals with income of residents abroad derived from the United

Kingdom. The law is given in a series of carefully drawn articles, and in the notes all the important cases, including, we need scarcely say, *Colquhoun v. Brooks*, *Gresham Life Assurance Society v. Styles*, *Kodak, Ltd. v. Clark*, are discussed, compared, and, as far as possible, reconciled.

*English Reports.* Vols. XLVIII to LV. Rolls Court, 1—8. Edited by M. A. ROBERTSON and G. ELLIS. Edinburgh: William Green & Sons. London: Stevens & Sons. 1904-5.

These eight volumes include one volume of Tamlyn, two of Keen, and thirty-six of Beavan's Reports, and therefore contain an immense mass of Equity decisions. Many of these are of course on obsolete points of law and practice, and some have been over-ruled, but when full allowance is made for this, there still remain a very large number which are or may be useful to practitioners at the present day. That this is so can be seen by a glance at the notes supplied by the learned Editors, who point out with great learning and care when a case has been reversed, followed, remarked on, etc., in more recent decisions. It is remarkable to notice that this great number of decisions are, with the exception of those contained in about the first 200 pages of the first volume, the decisions of only two judges, namely, Lord Langdale and Sir John, afterwards Lord, Romilly. And in addition to his large contribution to these reports the latter judge sat for something like nine years after the termination of the time included in Beavan. Different opinions are held as to the merits of these judges, but at any rate they did much to consolidate the practice and develop the doctrines of Equity. The best known decision of Lord Langdale at the Rolls is probably *Tullett v. Armstrong*, on the subject of the separate property of married women, but we may refer to a few others which are interesting for various reasons. For instance, he decided a number of cases concerning charities, many of which are worth noticing, either on account of the principles laid down or of the information given about well-known institutions. Thus, *Attorney-General v. Smithies* deals with a charity founded at Colchester by Eudo Dapifer, formerly seneschal of King Henry the First; *In re Rugby School* deals with the management of that school, and gives some interesting details as to the effect on the number of scholars of the headmastership of Dr. Arnold. *The Attorney-General v. Corporation of Shrewsbury*, gives some curious and interesting information as to the history of that old town.

Some of the city companies found themselves attacked by the Attorney-General for their management of charitable bequests: among them we find the Drapers', Grocers', Leather Sellers', Haberdashers', Fishmongers', and Ironmongers'. In *Simpson v. Lord Howden*, an agreement by a Railway Company with a Peer that the latter should withdraw his opposition to their Bill, was, *semble*, held contrary to public policy and illegal. *Stokes v. Holden* is a curious case where William Holden was fortunate enough, having been convicted of felony, to serve his sentence before a contingent legacy vested in him and so save it from forfeiture. *Croft v. Day* is concerned with the question of the trade mark of the well-known firm of Day & Martin, which is stated to have come into existence in 1801. *The Skinners Company v. The Irish Society* decided that the latter body was not accountable to the London City Companies. *Earl Nelson v. Lord Bridport* lays down how foreign law ought to be proved in an English Court of Justice. *Hargrave v. Hargrave* deals with the proof and kind of evidence necessary and admissible in cases of bastardy. *Ryves v. The Duke of Wellington* was a very curious case of a claim under an alleged will of George III. After 1840 we find a number of cases dealing with the powers and duties of Railway Companies, which were then rapidly coming into existence. One of these was *Colman v. Eastern Counties Railway Company*. The only other decisions of Lord Langdale we can refer to are *Clark v. Freeman*, where he refused to grant an injunction to restrain the publication of a libel, the libel being that a quack medicine was represented to be that of the plaintiff, Sir James Clark, a very eminent physician; and the important case of *Owen v. Homan*. This case was reversed by the Lord Chancellor but restored by the House of Lords, and it decided that sureties are not discharged by giving of time to the principal debtor, in cases where the remedies against the sureties are expressly reserved. One of the earliest of Sir John Romilly's decisions that we have noticed is *Oldfield v. Cobbett*, where he decided that a wife cannot be heard upon a motion on behalf of her husband. Another case bears a familiar name, *Penny v. Pickwick*. In *Underwood v. Wing* there was raised a question which has several times come before the Courts since, namely, the probabilities of survivorship of the persons who perish by the same calamity. The question of survivorship was raised again in *Ommaney v. Stilwell*, in the case of a sailor in Sir John Franklin's Expedition. Two important cases connected with

each other were *Swinfen v. Swinfen*, as to the power of an attorney to compromise an action, and *Broun v. Kennedy*, where a conveyance from Mrs. Swinfen to Mr. Kennedy, the barrister who had won the case for her, was set aside for undue influence. *Bradbury v. Dickens* was a dispute between the well-known publishers and Charles Dickens over *Household Words*. *Rogers v. Challis* decides that a Court will not grant specific performance of a contract to borrow money. We must conclude this list by mentioning *Thrupp v. Collett*, where a bequest of £5,000 left for purchasing the discharge of poachers "committed to prison for non-payment of fines, fees or expenses under the Game Laws," was held void as encouraging offences prohibited by the Legislature. It is interesting in looking through these volumes to notice the names of the various Counsel who walk across the stage. Mr. Pemberton, afterwards Lord Kingsdown, did an enormous business during nearly all Lord Langdale's time. Turner, Kindersley, and Bethell are also great names, and during Sir John Romilly's time Roundell Palmer reigns supreme. After Palmer became a law officer, Selwyn is the name that occurs most often. We have not noticed many appearances in that Court of Lord Cairns, though there are a few, and in one instance it is curious to see him with Roundell Palmer.

*International Civil and Commercial Law.* By F. MEILI. Translated and supplemented with additions of American and English Law, by A. K. KUHN. London: The Macmillan Company. 1905.

The translation which Mr. Kuhn has made of Professor Meili's book, supplemented as it is with concise statements of the English and American law, makes accessible to English lawyers a valuable compendium of the main principles of Private International law by one of the leading Continental experts on the subject. The theory and science of the conflict of laws is here treated upon a clear and progressive plan, the introduction giving the actual legislative provisions dealing with the subject, followed by a sketch of its historical development, after which the leading principles and questions of present importance are outlined, and then come the usual categories of the law of persons, of things, of obligations and succession, supplemented with special chapters on the law of bills and notes, and maritime law. The present edition will rank with the useful translations of Bar and Savigny's works as additions to the English legal library, and with its numerous references and succinct

summaries of comparative municipal laws it gives an excellent idea of the scientific basis and international character which the study of Private International law has now acquired. The only criticism of the original work which suggests itself is that it is presented in a form, which for wealth of detail and symmetrical arrangement gives the impression of a lecture rather than a treatise. The rendering of the original text is, with a few exceptions here and there, satisfactory (though one may query whether *renvoi* is adequately replaced by "reference," and whether such words as "transactual" are permissible), and the notes added by the translator are in thorough keeping with the original text, and bring out clearly the points which they serve to illustrate. The references to the proposals of the Institute, the work of the International Law Association, and the recent Hague Conferences, are features not always to be found in books on the subject; and the work is an admirable sketch of the whole system of the private legal relations between citizens of one State and those of another.

**Fourth Edition.** *Maxwell on the Interpretation of Statutes.*  
By J. A. THEOBALD. London: Sweet & Maxwell. 1905.

Nine and a-half years have elapsed since the publication of the last edition of this book, which was then edited by Mr. A. B. Kempe. The present edition has undergone no alteration in form, and, as perhaps might be expected, contains no new principles, but it does contain a large number of new cases, with the result of an increase in bulk of about forty pages. The paper and type are good, and make it a pleasant book to read, and the editing of it has been done with considerable care and learning. It is an interesting fact that the main cause of its increase in size is the development of municipal legislation, and the great increase in the number and scope of by-laws made by local authorities under statutory power. It is, therefore, probable that this source of decisions will increase rather than diminish in fruitfulness, and that Mr. Theobald will not have to wait nine and a-half years before he is called upon to edit a new edition. We think a couple of cases might with advantage have been added to the long list of authorities, namely, the very recent case of *R. v. Chandra Dharma*, which raised a curious point under the amendment of sect. 5, sub-sect. 1 of the Criminal Law Amendment Act; and the case of *R. v. Kennedy*, as to the enforcement of old penal statutes.

**Fifth Edition.** *Palmer's Company Law.* By FRANCIS B. PALMER. London : Stevens & Sons. 1905.

The fact of four large editions having been sold since 1898 shows sufficiently how this work has been appreciated. The Author, both on his title page and in his preface, points out that it is a book for business-men as well as lawyers, and it would be interesting to know how many of the former class have acquired such an excellent book on subjects which must be of the greatest importance to a large proportion of them. We do not propose to deal at length with so well-known and authoritative a work, but think it may be of interest to our readers if we call attention to some of Mr. Palmer's opinions on difficult and controverted points. We notice that he strongly dissents from the doctrine laid down in *Stephens v. Mysore Reefs Kangundy Mining Co.*, and thinks it cannot be maintained. He points out that in spite of the decision in *In re Laxon & Co.* (No. 2), there is some doubt whether an infant may be a subscriber of a memorandum of association. The difficult question as to how far a company is bound by articles which give rights to members, not as such, but in some other capacity, is treated at some length and with some hesitation. Mr. Palmer supposes the law is settled by *Eley v. Positive &c. Co.*, but does not express an opinion as to whether an implied contract between the company and a member is capable of being varied by the company against the wish of the other party, but thinks, when it comes to be decided, "some unexpected results may ensue." The decision in *Anglo-Exploration* is dissented from, as being inconsistent with the principles laid down by the House of Lords in *British and American Corporation v. Couper*. We notice that in spite of the repeal of sect. 25 of the Companies Act 1867, Mr. Palmer gives some of the leading decisions on it as being still of importance. In discussing in what sense directors are trustees, the learned Author thinks "the best, or the least controversial way of putting it, is to say that they occupy a fiduciary position," and goes on to make the very fair remark, "If for purposes of liability directors are to be treated as trustees, it is only fair that they should have the benefit of the relief discretion vested in the Court under sect. 3 of the Judicial Trustees Act 1896. The point has never been decided, but there is nothing in the Act to exclude them." The cases of *Salton v. New Beeston Cycle Co.*, *McConnell's Case* and *Inman v. Acroyd and Best*, are, in the opinion of Mr. Palmer, based on a false assumption as to facts



in *Swabey v. Port Darwin Gold Mining Co.*, and require reconsideration. The *Lee v. Neuchatel* series of cases are severely commented on, and the criticisms of the House of Lords, in *Dovey v. Cory*, are welcomed as administering a salutary caution "to those who desire to act on that series of decisions, and further developments may be expected." Another decision which the Author strongly disapproves of is that of the Court of Appeal in *Ruben v. Great Fingall Consolidated*, which, however, he hopes to see revised by the House of Lords. We notice the learned Author adheres to his criticism of the decision of the Court of Appeal in *Bartlett v. Mayfair Property Co.*; and in spite of the great authority of Lindley, L.J., who took part in the decision of that case, it is still submitted "that there is nothing sufficient in the Act of 1879 to show that it was extended to negative the Company's power to mortgage or charge the reserve capital." There are many more points we might call attention to, but will conclude our notice of this most valuable work by directing our readers' attention to Mr. Palmer's comment on sect. 10 of the Companies Act 1900. We have noticed what seem to us two small misprints. On page 92, line 7, the word *denying* seems to be wrong, and on page 277, in treating of debenture stock, it seems hardly correct to say "that interest on debenture stock is generally made payable only in the event of a winding up, and not at a fixed date."

**Seventh Edition.** *Browne and Powles' Law and Practice in Divorce and Matrimonial Causes.* By L. D. POWLES. London: Sweet & Maxwell. 1905.

Mr. Powles has made considerable alterations in the present edition. It has been re-arranged, and is divided into two parts; one being devoted entirely to law, and the other to practice. It has been also largely re-written, and special efforts have been devoted to curing it of some tendency to prolixity, which Mr. Powles confesses was a fault of the former editions. As an instance of these efforts it will be seen that the extract from the judgment of Lord Hannen in *Sottomayor v. De Barros* is now omitted, and also the extracts from the judgment in *Le Mesurier v. Le Mesurier*. This last case has, in the opinion of Mr. Powles, to all intents and purposes, though not technically, over-ruled *Niboyet v. Niboyet*. The difficult and

important question of "Domicile" is very fully and well treated with the help of extracts from Mr. Dicey's well-known work on the subject. We also notice extracts from Hammick's *Marriage Laws of England*; to which also the reader is further usefully referred in the footnotes. It is curious to notice that it seems probable that a person who is saved from the penalties of bigamy by 24 & 25 Vict. c. 100, s. 57—not 9 Geo. IV, c. 31, s. 22, as stated by Mr. Powles, which has been repealed—is guilty for the purpose of dissolution of marriage. In the second part the practice is very fully considered, and a large number of useful forms are given, not in an Appendix, but in the body of the work as they are required. In conclusion, we might call attention to Mr. Powles' complaint of the abuse of the practice of suing *in formâ pauperis*, and his suggestion for its amendment.

**Eighth Edition.** *A Summary of the Law of Torts.* By A. UNDERHILL, M.A., LL.D., and J. G. PEASE. London: Butterworth & Co. 1905.

Mr. Underhill says in his Preface, "the fact that seven editions of this work have been sold, that an American firm have thought it worth their while to issue an unauthorised edition in the United States, and that a Canadian edition has been published, renders it no longer necessary to apologise for its existence." He also goes on to explain why an Equity and Conveyancing counsel should have written on the Law of Torts. His answer is that every lawyer "ought to know the *principles* of every branch of the law." By those who read this treatise, and that many have read it the number of its editions shows, no apology or explanation will be wanted. Mr. Underhill has clearly got a thorough grasp of the principles he deals with. His book, which is divided into 130 articles, would make a good foundation for a code. The difficulty of drawing a code on such a subject can be seen from Mr. Underhill's observations on the subject of the responsibilities of masters to third persons for the torts of their servants. The effect on the civil remedy of the tort having been a felony is considered at some length, but no satisfactory answer is, or we think can, in the present position of the authorities, be given. A good illustration of the method of the work is the manner in which *Fletcher v. Rylands*, *Nichols v. Marsland*, and the other cases on the same subject are examined and compared.

The utility of this work to students is considerably increased by the collection of 237 questions on it given by Mr. Blagden, with references to the pages where the answers can be found.

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**Ninth Edition.** *Wolstenholme's Conveyancing and Settled Land Acts.* By B. L. CHERRY, LL.B., and A. E. RUSSELL, M.A. London: William Clowes & Sons. 1905.

The present edition is issued without the co-operation of the learned Author, Mr. Wolstenholme, whose health has not permitted him to take any part in its preparation; and the Editors have also to lament the death of one of the Editors of the last three editions, Mr. W. Brinton. The present Editors have, however, done their best to make up for these serious losses, and have succeeded in maintaining the high character of this work. *Wolstenholme's Conveyancing and Settled Land Acts* is too well known to require any description. It is indispensable to the conveyancer and real property lawyer, and constantly referred to by others whose work does not lie exclusively in such directions. One of the things that strikes a reader in looking over this work is the ingenuity which is exercised in finding out doubtful and undecided points, and the trouble, and what we may call courage, shown in suggesting answers to them. For a book to be really useful to a practitioner, it should give not only what has been decided to be law, but also help towards a solution of what has not yet been decided. We may also call attention to two or three excellent little summaries, such as those of the Married Women's Property Acts and the Settled Land Acts; the queries as to the decisions in *Re Cornwall's-West and Munro* and *Re Lord Stafford*; and the suggestion "whether provision should not be made for effecting within a given time a sale of the land of all public, ecclesiastical, and charitable corporations, and of all trustees for charitable purposes." It is worth noting that it would seem that the opinion of the Court must be obtained before erecting new buildings for the working classes under sect. 74 (b) of the Housing of the Working Classes Act 1890. Another important note is that which submits that rule 14 of the Settled Land Act Rules 1882 is *ultra vires*.

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*Every Man's Own Lawyer.* London: CROSBY LOCKWOOD & SON. 1906.—As usual this “handy book” contains an immense amount of information, on the whole very accurately given. With the present, the forty-third edition, the work has been enlarged and re-arranged. Several important new Statutes have been added, including the Trades Marks Act 1905; Railway Fires Act 1905; Aliens Act; Unemployed Workmen Act; and others of public interest. The concise Dictionary of Legal Terms has been enlarged, but there is a little slip in the definition of *nolle prosequi* which is only applicable to criminal proceedings, not as suggested there to civil also; in the latter case, the somewhat analogous proceeding is *discontinuance*.

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*The Indian Contract Act.* By Sir F. POLLOCK, Bart., assisted by D. F. MULLA, M.A., LL.B. London: Sweet & Maxwell. 1905.—The Indian Contract law is, in effect, as explained in the preface to this work, a code of English law. This work may usefully be consulted by students of the principles of the law of England concerning contracts. In India itself the book will be of very great value.

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*New York State Library Yearbook of Legislation, 1904.* Edited by R. H. WHITTEN. Albany: New York State Education Department. 1905.—The reader will find in this volume the latest information as to law-making and proposals for law-making from New York. Students of American law and of comparative jurisprudence will welcome it.

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*Guide to Finger-Print Identification.* By H. FAULDS, L.F.P.S. Hanley: Wood, Mitchell & Co. 1905.—We once heard a preacher lay down from the pulpit what he called a most important proposition of law, to wit, “that the man who suffers for any crime ought to be *one and the same man* as the man who committed that crime!” If this be a proposition of law, the work before us is a legal text-book: and the system set forth, which, as the Author points out, ought not to be confused with the Bertillon system of anthropometry, is a most valuable scheme under proper safeguards. Both the scheme and the safeguards are adequately dealt with here.

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*Ancient Law.* By Sir HENRY S. MAINE, K.C.S.I., LL.D., F.R.S. London: John Murray. 1905.—Maine's *Ancient Law* is in its own way a classic; and its pages do not at this date call for any comment here. Every student of sociological history ought to read it, not as gospel-truth, but as a valuable contribution to the subjects of which it treats. We are, therefore, glad to welcome a cheap edition, which appears very cheap indeed at half-a-crown. The paper, the printing, and the binding are all good. The book deserves a large circulation.

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*The Law of Corporations.* By C. T. CARR, M.A., LL.B. Cambridge: The University Press. 1905.—This is the Yorke Prize Essay for 1902, and in a short space it exhibits well the main principles of the law under consideration. There is an interesting passage on municipal trading in the last chapter. “This movement,” says the Author, “is not only commercially important. It is social and

political." This is true, and well said. And the Author's illustrations of it are good and pointed. There is much food for thought in this work for the politician, as well as mere practical material for the lawyer.

*The Student's Guide to Constitutional Law and Legal History.* By CHARLES TIHWAITES. London: George Barber. 1905.—This book, which has now reached its fourth edition, is intended for Bar students, and contains much matter useful to those preparing themselves for examination. It includes an introduction, advice as to the course of reading, test questions on Dickey's *Law of the Constitution*, a chronological list of the rulers of England since 1066, a digest of questions and answers and an index.

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*Snowden's Magistrates' Assistant and Police Officers' Guide.* By T. O. HASTINGS LEEN, M.A., and J. R. SHIELD. London: Butterworth & Co. 1905.—This little book has evidently gained considerable popularity, judging from the fact that it has now reached its eleventh edition. It contains much useful information and practical advice, but it does not seem to have been very carefully revised. It is odd in a book so recently published to find a reference to the Court of Queen's Bench. To say that a grand jury may consist of any number more than eleven is rather inadequate without adding that it is the invariable practice that the number shall not exceed twenty-three. A more serious mistake is the omission of any reference to the extension of the time-limit, on prosecutions for offences against girls of thirteen and under sixteen, from three to six months by The Prevention of Cruelty to Children Act 1904. A jury in a county court now consists of eight, not five. The date of *Payne v. Wilson* is given as 1875 instead of 1895.

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*Solicitors' Liens and Charging Orders.* By F. W. ATKINSON, LL.D. London: Sweet & Maxwell. 1905.—Mr. Atkinson has, we imagine, been induced to write this book mainly for the benefit of his professional brethren, and to facilitate their recovering their costs from ungrateful clients. To solicitors we venture to think it will be of great assistance, and probably save them much searching through many books. Mr. Atkinson divides his subject into three main parts: "Lien on Documents;" "Lien on Funds;" "Charging Orders under the Solicitors Act 1860;" but in dealing with them in the body of the work this order is reversed. The addenda are unusually ample.

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*Walker and Elgood's Compendium of the Law of Executors and Administrators.* By E. J. ELGOOD, B.C.L., M.A. London: Stevens & Haynes. 1905.—This well-known work, the fourth edition of which is now before us, deals with a subject of immense scope, but the whole has been usefully condensed into the small volume here under notice. The principles, for instance, which should guide executors in making investments are succinctly set forth on pp. 192 and 193. The work ought to be used in conjunction with a suitable treatise on the law of trusts, which is closely connected with the subject. A valuable feature of the work is the appendix of statutes, which occupies 76 pages, and is annotated by means of references to the text.

## CONTEMPORARY FOREIGN LITERATURE.

*La Constitution Juridique de l'Empire Colonial Britannique.* By H. SPEYER, Docteur Spécial de la Faculté de Droit de l'Université de Bruxelles. Paris, 1906.

It is always instructive to see English constitutional matters treated by foreign jurists, especially by one of the eminence and experience of Dr. Speyer. His forecast of the future is that the autonomous colonies will admit nothing more than a sentimental and nominal suzerainty of the mother country, and even to obtain this some system of fiscal reform must be undertaken by the United Kingdom.

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*Documents et Renseignements*, judgments, &c. (in all five pamphlets), in the case of the Princess Stéphanie, Countess of Lonyay *v.* Baron Constant Goffinet, and others. Brussels, 1905.

These form a very complete and interesting account of the recent unsuccessful action by a daughter to obtain part of her deceased mother's estate. One thing that will strike an English lawyer is the mass of opinions of jurists—including English and American—contained in the case submitted to the Court of Cassation at Brussels.

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*Die Lehre der Rechtssouveränität.* By Dr. H. KRABBE, Professor in the University of Groningen. Groningen, 1906.

A German translation of the work originally composed in the Dutch language. Its object is to show that the State is as much dependent on law as the person for its existence and development. Those who have read Professor Dicey's works are familiar with this aspect of the question, but it has seldom been in fashion with Continental jurists. The learned writer points out that Constitutional law is always concerned with what he calls *dualismus*, its objects being both normal and abnormal persons. In the course of his argument he reviews the main English authorities, with whom he is not always in complete agreement. Thus he considers that Austin's "habit of obedience" would be applicable to a band of brigands.

## PERIODICALS.

*Journal du Droit International Privé*, 1905. Nos. VII—X. Paris, 1905.

M. Raynaud discusses the English doctrine of contraband, and suggests an international conference for the purpose of determining some of the disputed points (p. 945). There are numerous decisions of international importance, the following among others: A Frenchwoman who has married an Englishman and afterwards obtained a decree of judicial separation, is of English nationality for the purposes of the French Courts, those Courts accepting the English decision as to her status as being a judgment *in rem* (p. 1009). In an action for calls by an English mining company, the Belgian defendant alleged fraud. The civil tribunal of Brussels held that the matter must be determined by English law, and that although possibly damages might be given, rescission would not be decreed (p. 1099). The case of the Oldenburg Minister of Justice, the café waiter, and the Minister's gambling proclivities, is discussed at p. 1165. The headnote is to the effect that *le Poker n'est pas un jeu de hasard*. The case attracted some attention in the English newspapers last summer, and seems to have attained in Germany an importance beyond its merits.

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*Deutsche Juristen-Zeitung*. 15 October—1 December. Berlin, 1905.

Among other articles of interest are the following:—Dr. J. Stranz criticises the recent decision by which an injunction was issued against the *Berliner Illustrierte Zeitung* for a series of pictures illustrating the comic side of the life of one Professor Biedermann. The injunction was obtained by a real Professor Biedermann belonging to one of the Prussian universities. There seems to have been no likeness between the journalistic and the real Professor. One occasionally finds strange words in legal German, but the phrase *Donquichoterien*, applied to the judgment of the Court, seems one of the strangest on record (p. 934). The question of the treatment of juvenile offenders, now exciting much interest in Germany, is discussed by Dr. Köhne (p. 1087). The main sections of the Civil Code affecting the question are sects. 1666 and 1838, and there are also some municipal regulations. Still the law is very incomplete, as Dr. Köhne shows.

*La Giustizia Penale.* 28 September—23 November. Rome, 1805.

On p. 1442 is a very remarkable offence, *viz.*, the obtaining by a specious story from a friend of the defendant's in a suit certain documents for the non-production of which at the trial the defendant was condemned for contumacy. The offence was held to be suppression of *atti* within sect. 283 of the Penal Code. The judgment proceeded to a great extent on texts of the Digest, especially ii, 10, *De eo per quem factum erit quo minus quis in judicio sistat*. At p. 1609, in another decision as to contumacy, it was held that a conditional pardon is not abrogated by the contumacy of the accused. In this case French decisions were cited.

JAMES WILLIAMS.

## WORKS OF REFERENCE.

*The Lawyer's Remembrancer and Pocket Book for 1906.* By A. POWELL, K.C. London: Butterworth & Co.—In the present issue no alteration appears to have been made in the general arrangement of this extremely useful little pocket-book, but throughout it seems to have been carefully revised and brought up to date. A concise and well-written article on the Public Authorities Act, the extension of the article on Costs, and the inclusion of Ryde's Scale of Surveyors' Fees, are new features of the current issue.

*The Lawyer's Companion and Diary, 1906.* Edited by E. LAYMAN, B.A. London: Stevens & Sons.—This is, perhaps, the best-known of the legal diaries. In addition to the diary, the contents include tables of Costs, time tables of the Courts, an Index to Practical Statutes, a list of the Public Statutes of 1905, and tables of estate, legacy and succession duties.

*Sweet and Maxwell's Diary for Lawyers, 1906.* Edited by F. A. STRINGER and J. JOHNSTON. London: Sweet & Maxwell.—All who have used this diary must regard it as one of the most complete and useful of its kind. The arrangement is convenient for ready reference. The information given in the work is full, and the names of the Editors should be a sufficient guarantee of its reliability. The County Courts Order in Council 1904, has been inserted in the present issue; the alterations in the County Court Costs, under the County Court Rules 1904, have been noted, and the County Court Time Table has been recast and re-arranged.

*Fry's Royal Guide to the London Charities, 1906.* Edited by J. LANE. London: Chatto & Windus.—We have pleasure in acknowledging the new issue



of this work. The aim of the Guide is to give information concerning London's charities, alike to those who give and those who receive; and this information we find given in a clear and concise form, which renders the work exceedingly useful for guidance in the bestowal of charitable donations.

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*The Writers' and Artists' Year-Book, 1906.* London: A. & C. BLACK.—This is a very useful little work of reference for writers and illustrators. It gives an alphabetical list of papers and magazines, with details indicating the style of articles likely to meet their requirements. Lists of book publishers, colour printers, and a classified index are also included.

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Books received, reviews of which have been held over owing to pressure on space:—*Mercier's Criminal Responsibility; English and Indian Law of Torts* (Bombay Law Reporter Office); *Melshheimer and Gardner's Laws of the Stock Exchange*; Jackson's *Law of Repairs and Improvements*; Gulson's *Philosophy of Proof*; Porter's *Principal and Agent*; Jenks' *Digest of English Civil Law, Book I*; *Selden Society's Publications, Vol. 20*; *Der Tatbestand de Piraterie* (Ducker & Humblot); *Yearly County Court Practice 1906*; Lushington and Coltman's *Practice at Parliamentary Elections*; Hudson's *Law of Compensation*; Fraser's *Law of Parliamentary Elections*; Briggs' *Law of International Copyright*; Emanuel's *Law of Contracts*; Paterson's *Licensing Acts*.

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Other publications received:—*Officialism* (Incorporated Law Society); *Public Provisions: Metropolis Water Act 1902*, (being a supplement to *Reeson's Gas and Water Acts*, bringing the same up to date); Vecchio's *Il Commismo Giuridico del Fichte*.

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The *Law Magazine and Review* receives or exchanges with the following amongst other publications:—*Juridical Review, Law Times, Law Journal, Justice of the Peace, Law Quarterly Review, Irish Law Times, Australian Law Times, Spectator, Canada Law Journal, Canada Law Times, Chicago Legal News, American Law Review, American Law Register, Harvard Law Review, Case and Comment, Green Bag, Madras Law Journal, Calcutta Weekly Notes, Law Notes, Law Students' Journal, Bombay Law Reporter, Medico-Legal Journal, Indian Review, Kathiawar Law Reports, The Lawyer (India), South African Law Journal.*

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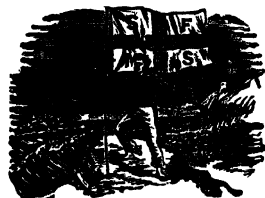
It has also brought out a Judeo-German Version of the whole Bible. It has given the Breton people the only Bible in their language, 10,000 copies of which have been printed.

It has provided the only existing New Testament in the Basque language, and has undertaken the Kurdish New Testament and Kabyle Gospel in Arabic Characters.

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EDITED BY

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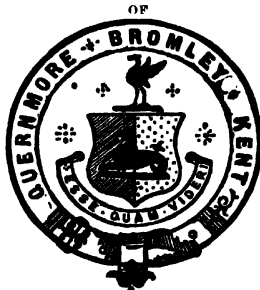
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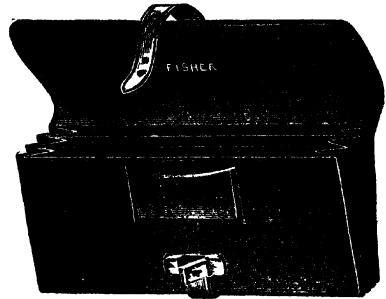
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# THE LAW MAGAZINE AND REVIEW.

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No. CCCXL.—MAY, 1906.

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## I.—RESPONSIBILITY IN LAW.

### I.

IF one may judge by what has been written, and continues to be written on the subject, the treatment of the question of Responsibility in Law has not yet arrived at a satisfactory solution. In attempting to carry its discussion a little further, if not indeed to solve the problem, it will be necessary first of all to consider what is meant definitely by Law and what by Responsibility. It seems at once apparent that, until we arrive finally at a correct idea of what is involved in the term Law, we are not likely to arrive at a solution of the problem of Responsibility. If we are to confine our notion of Law within the limits assigned to it by the well-known definition of Austin,<sup>1</sup> and to say, that anything outside of it is but an "extension of its meaning by metaphor or analogy," then our notion of Responsibility will be apt to suffer a like limitation; and the differences of opinion which subsist—markedly between the medical and legal professions—upon some phases of the question are likely to continue. Law must be viewed from a higher standpoint than that taken by Austin in his definition of positive law, and may be defined, as the continuous and uniform exhibition of a governing power in thought or action. Continuity and uniformity, then, seem to be the

<sup>1</sup> *Lectures on Jurisprudence*, Campbell's Abridgment, pp. 5, 11, 16, etc.

distinguishing features of law;<sup>1</sup> and command is but an incidental circumstance imposed on it by way of analogy of the State to a supremely governing power. If this view be correct, the breach of law is a breach of continuity and will be followed by catastrophe:<sup>2</sup> and experience should lead us to expect this result as the inevitable consequence. By "a common understanding and a common purpose," society learns to exist under a reign of law: by "orderly and systematic knowledge," Man gains that "prescience and power"<sup>3</sup> which is the outcome of a true perception of universal and necessary law.<sup>4</sup> "The conditions are in us,"<sup>5</sup> but how does this knowledge of law come to us? It comes to us in the way of other human knowledge, by the interaction of the natural and the spiritual constitution of our being:<sup>6</sup> it is enough to state the position here, but it must be worked out later on. We have to find a true Psychology<sup>7</sup> in which the natural and the spiritual in man are distinguished and in which we shall find law and responsibility explained in the unity of self-consciousness. How, then, do we arrive at "the conception of the universe as a realm of law":<sup>8</sup> is it true, to say, that we derive our notion of universal law from laws imposed on man by an overmastering authority?<sup>9</sup> It may be admitted that, in this way, arose man's earliest conception of law: either by the belief in God or gods, deifying the forces of nature or rising to the conception of an All-wise All-good Supreme Being, man came to realise his impotence and to realise the inevitableness of punishment for the breach of law, for

<sup>1</sup> *Grammar of Science*, Pearson, ch. III, sect. 11.

<sup>2</sup> *Naturalism and Agnosticism*, Ward, Vol. I, 226; Vol. II, 261.

<sup>3</sup> *Ibid.*, Vol. II, pp. 237, 238, 239; 247, 248; 251, 253, 225, 252, 249—252, 233.

<sup>4</sup> *Ibid.*, 250, 251. <sup>5</sup> *Ibid.*, 250.

<sup>6</sup> *Essays on Literature and Philosophy*, Caird, Vol. II, pp. 513, 449, 503, 437.

<sup>7</sup> *Ibid.*, 441, 451, 421; *Naturalism and Agnosticism*, Ward, Vol. II, pp. 233, 234.

<sup>8</sup> *Ibid.*, Vol. II, 233.

<sup>9</sup> *Ibid.*, 249, 251, 252; *Campbell's Austin, Jurisprudence*, 5, 6; *Jurisprudence*, Holland, 8th edition (1896), 37 (end of ch. III).

doing that which the gods forbid, for committing wrong: and so he came to find that he must live under law, to escape catastrophe. Thus man came to make laws for himself: to escape extinction, he learned the social order; to ward off death and destruction, he enforced the decrees of the gods upon those who would have brought the State in jeopardy—catastrophe upon the community was averted by punishment of the individual. It seems, then, that the conception of human law historically is derived from the divine: and that its leading feature is not that either of command or punishment, but rather that of uniformity or consecutive order—indeed breach of law and retribution will appear as cause and effect. Accountability to law must be something in the concrete or in the abstract—then to what or to whom? It may be to universal law or to a universal law-giver; or it may be considered as centred in the State. But the State itself, as history shows, is accountable to the law of nature and ultimately to the moral law for its very existence. Man, that he might save himself from the law of nature—in which multitudes go down, leaving only the fittest—had to ask himself: “Knowest thou the ordinances of Heaven; can’st thou determine the influence thereof on the earth?”<sup>1</sup> Thus was man led to a true conception of the existence of universal law; and yet, living subject to law, he was led to perceive that to observe the law is to transcend it<sup>2</sup> and to become free. On this question of Freedom rests that of Responsibility.

## II.

For the survey of Responsibility, a somewhat wider range is necessary. The notion of Responsibility lies deep down within the recesses of philosophy and religion—which are indeed one; a true philosophy cannot be reached but

<sup>1</sup> *Book of Job*, ch. xxxviii, 33.

<sup>2</sup> *Essays on Literature and Philosophy*, Caird, Vol. II, 283.



through true religion—leading up through human knowledge to the word of God.<sup>1</sup> To deal with Responsibility on any other basis must prove inadequate. Let it not be misunderstood: even were the everlasting God of the Christian to be a myth, and some sort of pantheism or deism to be a reality, the position would not be altered. Few indeed have the temerity to deny the need of Religion to humanity; each man has to form for himself, or accept from others in whom he trusts, his conception of religious truth; Sir Oliver Lodge<sup>2</sup> seems to think that the conception of a true religion has to wait upon the advance of metapsychical research—perhaps the latest form of the Religion of Humanity. After all, the only conclusive test of true religion open to our finite intelligence is that which we apply to any ordinary branch of knowledge, when we ask ourselves, “Does our reason stamp it with the seal of faith; has it objective validity in our experience?”<sup>3</sup>

It will be necessary first, to find a psychological basis for Responsibility. This will be of great advantage, but it will not carry us far; for, according to the ordinarily accepted principles of Psychology, the natural side of the constitution of man is presented to us for analysis; while the spiritual side is either kept blank or confused with the natural. It will be therefore necessary, in the second place, to supply a more complete psychology of the human mind in relation to the spiritual part of man, and thereby to arrive at a philosophically ample basis for Responsibility. When this position is happily reached, it may be possible so to determine the nature of Responsibility that many of the legal questions that arise, in the departments of contract, tort and crime, may meet with an easier and less uncertain solution.

<sup>1</sup> *Essays*, Caird, Vol. I, pp. 207, 206—210; *St. John*, vi, 63.

<sup>2</sup> Lecture delivered at Oxford, 13th November, 1905, on “Psychical Research and its bearing on Science and Religion”; Sir Oliver Lodge, *Life and Matter*, pp. 11, 124, 155.

<sup>3</sup> *Essays*, Caird, Vol. II, p. 454; *Elements of General Philosophy*, Robertson, pp. 97, 116, 15.

The attempt has been made to account for Responsibility and justify punishment on quite other grounds than these. Responsibility, as commonly understood, goes no further than the contemplation of liability to punishment for wrongdoing under some moral or legal code. A recently published treatise,<sup>1</sup> which affects to treat of law in relation to responsibility as it "ought to be" rather than as it "is," uses the term "responsible" in the sense of "Rightly liable to punishment." Responsibility is stated to be "the quality of being rightly liable to punishment," and, "is therefore not a quality of the person who has inflicted the pain, but a demand on the part of others that he shall suffer."<sup>2</sup> "A person is held responsible when the enlightened public opinion of his age and country demands that he shall be made to suffer in return for pain that he has inflicted": and this is called "the Sentiment of Justice." Furthermore, "legal punishment in its origin is essentially vindictive . . . whenever punishment is inflicted, the primary object is to award suffering in retaliation for evil . . . the primary aim of punishment . . . is shown, both by its history and its current use, to be primarily and essentially retribution."<sup>3</sup> It is a little difficult to understand why a person should be held liable to punishment for a "quality" which is not in him but in the person demanding it; the situation seems to bear some analogy to the wolf and the lamb in the fable. It is at once apparent that, on this view, the basis of Responsibility rests on a sanction no higher than the law of nature, common to man and to the lower animals: it is the law of retaliation. The law of England has already, happily, advanced beyond this stage: and it is one of the main purposes of this treatise, to show, how the law of England

<sup>1</sup> *Criminal Responsibility*, Mercier, pp. 8, 9.

<sup>2</sup> *Ibid.*, pp. 8, 16, 17.

<sup>3</sup> *Ibid.* It is not my purpose to enter on a criticism of this treatise, although I may have to refer to it occasionally; to any lawyer it would seem a mere waste of time to enter on a consideration of what the law "ought to be" without a previous most careful consideration of what the law "is."

has, in dealing tenderly with the weak and erring, gone some way to solve the problem of Responsibility: and to show in what direction its further solution lies.

In a legal sense, the condition of Responsibility is that of the man who is considered capable of acting up to the standard of what is required of him, either in a special capacity or in a general way. This may be a sufficient definition of responsibility for that of which the law has to take immediate cognisance, namely, for the acts of a man as they come before it; but responsibility cannot be limited in this way without grave danger to the State. The State may shift its own responsibility for a time, but cannot get rid of it: it is responsible for the good of the whole and all its parts. It is not enough for the State to delegate to a judicial system its duties, in the preservation of order and the punishment of offenders: "Woe unto the world because of offences! . . . but woe to that man by whom the occasion of stumbling cometh"<sup>1</sup>: it is the duty of the State to remove occasions of stumbling. Mr. Mercier declares<sup>2</sup> that the aim of punishment is "primarily and essentially retribution." This assumption seems to proceed from a confusion of cause and effect. Punishment no doubt produces a retributive effect—a requital for evil done; and historically it may have had no higher aim than that of retaliation—the return of like for like. The nature of punishment, after all, is not fixed by its historical origin: what this is, we should be able to learn by experience in the development of human institutions. It has already been shown that the natural result of breach of law is catastrophe; and that the State, out of regard for its own security, must order itself according to law, and should take the promptest measures to avert any breach of continuity by removing the law-breaker from the body politic. If this view be correct, it follows that the primary object or aim of punishment will

<sup>1</sup> *St. Matthew*, xviii, 7.

<sup>2</sup> *Criminal Responsibility*, Mercier, p. 16.

be to preserve order and continuity in the State; but, inasmuch as the State is weakened by the removal of any of its members, the secondary object will be reformation of the law-breaker; and, quite apart from these objects or aims, two effects should be produced—requit for the evil, prevention of its recurrence. These, then, should be the objects and results of punishment: anything in the nature of retaliation or vindictiveness ought stringently to be eliminated from the code of a civilised State. The law of self-preservation alone ought to teach one that even in England the system of legal punishments is not only barbarous and futile, but directly contributory to the evils which it is intended to suppress. When the far-reaching tendrils of human action in the region of responsibility are fully realised, we may hope to see more recognition of the need for a reformatory element in punishment.

This conception of law, as the realisation of an overmastering authority—universal, uniform, continuous,<sup>1</sup>—to which law instituted by man is law but by analogy, is vital. No theory of Responsibility, by which the infliction of punishment may be justified, is possible apart from it. “Till heaven and earth pass, one jot or one tittle shall in no wise pass from the law, till all be fulfilled.”<sup>2</sup> Law cannot be broken but by catastrophe: the breach is blotted out: there must be reparation, if law is to continue. If it were not so, there would be no law. Then, for every breach of law there must be atonement, to enable law to continue: and, reparation being made, the opportunity for reformation arises. Reformation is possible to man through the spirit that is within him: reparation being made, he may reform his ways—he may be born again of the spirit.<sup>3</sup>

### III.

In its widest sense, then, Responsibility may be regarded as that state of an intelligent and sentient being in which he

<sup>1</sup> *Naturalism and Agnosticism*, Ward, Vol. II, pp. 219, 251, 252.

<sup>2</sup> *St. Matthew*, v, 18.

<sup>3</sup> *St. John*, iii, 3.

has the capacity to act according to law. In proceeding to inquire into the nature of this capacity, we shall be led into an examination of the constitution of Mind: it will be necessary to find, as has been said, a psychological basis for responsibility.

Viewed psychologically, Mind has been declared to be "a name for our subjective experience":<sup>1</sup> and "the first thing that strikes us in our conscious experience is the continuity of it."<sup>2</sup> "Our whole mental experience presents three distinguishable phases . . . states or facts of consciousness, which may be exhaustively described . . . in terms of three heads: and these heads . . . are Feeling, Knowing, Willing. Every fact of consciousness may be brought under one or more of these heads."<sup>3</sup> Hence "we may say that knowing, feeling, and willing are the three primary functions of mind."<sup>4</sup> The growth of Mind,<sup>5</sup> is to be traced mainly from sense-experience issuing by way of impulse from our general sensibility and the play of our sense-organs.<sup>6</sup> "Sensation is a fact of our conscious experience—a fact of mind."<sup>7</sup> Again, we have to distinguish between active sense and passive sense;<sup>8</sup> in the former case, we are "actively seeking sensation," and in this we have "the substructure for Perception." A percept has been described as "an intellectual construction on occasion of sense, together with present consciousness of activity exerted":<sup>9</sup> percept, then, is an "intellectual construction out of sensations," and on this base "further constructions takes place."<sup>10</sup> We have first a presentation to the Mind out of present sensations—producing percept,

<sup>1</sup> *Elements of Psychology*, Robertson, pp. 7, 8, 15, 48, 52, 10, 16, 49.

<sup>2</sup> *Ibid.*, 16.

<sup>3</sup> *Ibid.*, Robertson, p. 21; *Mental and Moral Science*, Bain, pp. 2, 18, 68, 200, 215, 402, 342, 90; *The Human Mind*, Sully, Vol. I, pp. 59, 61, 64, 66, 67.

<sup>4</sup> *Ibid.*, Vol. I, p. 67.

<sup>5</sup> *Psychology*, 48, 56, 58, 64, 67; *Naturalism and Agnosticism*, Vol. II, pp. 195, 196. <sup>6</sup> *Ibid.*, 56, 64, 67; *Mental and Moral Science*, 14. <sup>7</sup> *Ibid.*, 45.

<sup>8</sup> *Psychology*, pp. 88, 99, 96; *Naturalism and Agnosticism*, Vol. II, pp. 235, 237, 246. <sup>9</sup> *Psychology*, pp. 133, 134, 97. <sup>10</sup> *Ibid.*, p. 134.

the process being known as perception: but, secondly, we may have "a percept reproduced in consciousness . . . without accompanying presentative form"—in re-presentative form or image, the process being known as imagination. Re-presentation in consciousness of what previously has been experienced is what is called Memory.<sup>1</sup> Re-presentative imagination, or "bringing what was in our consciousness back again to our consciousness" is not to be confounded with constructive imagination, in the popular sense, where further functions of the Mind than those just enumerated have place, and which does not now concern us:<sup>2</sup> what we have to do with here is the "memory—image." The percept and image, although thus closely related,<sup>3</sup> are to be distinguished by the fact that the percept arises in consciousness by way of direct sense-stimulus, whereas in the case of image there is no such stimulation.<sup>4</sup> In the growth of Mind, perception and imagination—presentation and re-presentation—are closely associated;<sup>5</sup> but there is an important distinction to be noticed here of the manner in which the percept and the image respectively come into consciousness:<sup>6</sup> "in perception there is always something independent of the laws of Mind; but the flow of images is purely psychological."<sup>7</sup> The percept comes into consciousness, in the first place, by way of physical surroundings; and, only in the second place, by way of psychological conditions: to the extent to which it is affected by physical surroundings, it is physically determined; to the extent to which it is affected by psychological conditions, it is psychologically determined—"the physical and the psychological meet in perception . . . but the flow of images is purely psychological."<sup>8</sup> The percept then comes into our

<sup>1</sup> *Ibid.*, pp. 135, 134.

<sup>2</sup> *Psychology*, Robertson, pp. 137, 140; *The Human Mind*, Sully, Vol. I, pp. 279, 362. <sup>3</sup> *Psychology*, pp. 136, 142, 146. <sup>4</sup> *Ibid.*, pp. 142, 145.

<sup>5</sup> *Ibid.*, pp. 136, 142, 146, 147; *Mental and Moral Science*, Bain, pp. 89, 90.

<sup>6</sup> *Psychology*, pp. 145, 146. <sup>7</sup> *Ibid.*, p. 146. <sup>8</sup> *Ibid.*, pp. 145, 146, 142.

experience, physically by way of our environment, and mentally by way of the attention which we give to it; and percepts have the tendency to persist, to reinstate themselves as images in the mind by way of suggestion.<sup>1</sup>

We are now in possession of data sufficient to find a psychological basis for Responsibility. "Our consciousness is never exclusively perceptive [i.e., *physically determined* in respect of environment, and *psychologically determined* in respect of the amount of attention given to it<sup>2</sup>] . . . for any length of time; it is always liable to be broken in upon by suggested images;"<sup>3</sup> for "re-presentative consciousness flows in for us in connection with presentative consciousness."<sup>4</sup> *Responsibility then may arise*, with regard to an event, in *presentative consciousness*, in respect of the extent of attention which is turned upon it; and in *representative consciousness*, in respect of the nature and extent of the suggested images by which our consciousness is always liable to be broken in upon.<sup>5</sup> It seems then that, within the limits of individual experience—confined to sense-perception and representative imagination,<sup>6</sup> the questions that may be asked in respect of accountability for any particular action, are two: (1) Is the Mind capable of giving, and has it given, the necessary attention to the matter in hand; and (2) the images or ideas, suggested to the individual consciousness, are they normal or abnormal?<sup>7</sup> To put it in another way: we cannot regulate our perceiving and imagining<sup>8</sup> as we can our thoughts and desires; to a certain extent they are outside of the direction of our will—being physically determined by our environment, and psychologically determined by suggestion and association arising out of that environment and flowing from our subjective experience. It will follow, therefore, that,

<sup>1</sup> *The Human Mind*, Vol. I, pp. 145, 146, 148, 152, 154; 76, 77, 79.

<sup>2</sup> *Psychology*, pp. 145, 146.

<sup>3</sup> *Ibid.*, pp. 154, 136, 146, 166.

<sup>4</sup> *Ibid.*, pp. 150, 163, 160.

<sup>5</sup> *Ibid.*, pp. 144, 145, 146, 150, 154, 156.

<sup>6</sup> *Ibid.*, p. 136.

<sup>7</sup> *Ibid.*, pp. 135, 140, 149.

<sup>8</sup> *Ibid.*, p. 189.

under the law of nature as psychologically explained, the human mind is not wholly self-determining. Taking the natural man, as mentally equipped with the three primary functions of, intellection, feeling, and conation,<sup>1</sup> we find that there is an element of Necessity in the intellective function of the mind. But the Mind cannot be solely intellective at any one time;<sup>2</sup> feeling and conation as well as intellection enter into mental operations even at the earliest stages of experience; and the work of intellection is psychologically complete when its three products—percept, image, concept (or general notion), have been explained.<sup>3</sup> The three corresponding processes—perception, imagination, conception—may be taken as the intellectual groundwork of the natural faculties of man—in no way distinctly differentiating him from the lower animal creation, except as to degrees of growth or development.<sup>4</sup>

Here, then, we have a dualism of body and soul.<sup>5</sup> How are we to find the means of unification; how are we to bring together the “related presentative and representative consciousness”; how are we “to get farther towards bringing nerves and consciousness together?”<sup>6</sup> We have an answer within our own self-consciousness, and in that group of faculties<sup>7</sup> which in distinction from the natural faculties of man may be classed as the spiritual or constructive faculties of the Mind exercised in the operations of reason and conscience.<sup>8</sup>

It is evident that the unification of body and soul, Mind

<sup>1</sup> *Psychology*, 21, 165.

<sup>2</sup> *Ibid.*, 25, 56, 188, 191, 193, 199, 220; 48, 200, 199; *Human Mind*, Vol. II, 296, 297, 298. <sup>3</sup> *Ibid.*, 165, 166; *Philosophy*, 186, 190; 120, 121.

<sup>4</sup> *Psychology*, 56, 52, 174, 48; 20; *Philosophy*, 120; *The Human Mind*, Vol. I, 56, 57, 58; 20, 21; 71. <sup>5</sup> *Ibid.*, pp. 136, 166; *Philosophy*, pp. 189, 120, 121.

<sup>6</sup> *Ibid.*, 151; *Philosophy*, 224; *The Human Mind*, Vol. II, Appx. N, p. 366; Vol. I, 52.

<sup>7</sup> *Ibid.*, p. 20; *Philosophy*, pp. 120, 121; *Human Mind*, Vol. I, 71; Vol. II, 302.

<sup>8</sup> *Naturalism and Agnosticism*, Ward, Vol. II, 256; *Mental and Moral Science*, Bain, 146, 161, 448, 431, 456.



and Matter, must spring from some source other than the body and soul which it affects to unify. It must have its source, then, in the tripartite nature of man—body, soul, and spirit: in spirit, in the unifying principle of self-consciousness, we have the uprising of that reason by means of which “the opposition of thought to its object . . . . may be transcended.”<sup>1</sup>

We have now reached this result, that the growth of Mind by way of the three primary functions—intellection, feeling, and will—is commensurate with our mental experience in so far as the purely animal nature of man is concerned,<sup>2</sup> but that new phases of mind must be made manifest before we can account for the higher facts of self-conscious experience. We must look for a regulative faculty to control the disparate functions of body and of soul, moving from higher law than that of mere animal endowment:<sup>3</sup> peradventure this regulative faculty may be found in the spirit of man working by way of reason and conscience. Thus we shall have the three primary functions of mind capable of becoming directed each to an end or ideal—intellection discriminating between the true and the false; feeling becoming productive of the higher emotions; and will conducing to well-being by choice between the right and the wrong.<sup>4</sup>

Practically, society forms for itself certain standards of logical consistency, of control of feeling, and of right conduct as the normal rule of life; any marked departure therefrom will be considered abnormal.<sup>5</sup> Reason, then, may

<sup>1</sup> *Essays on Literature and Philosophy*, Caird, Vol. II, pp. 431, 513, 514, 515, 523, 528, 538; 1 *Thessalonians*, v, 23; *Hebrews*, iv, 12; *Human Personality*, Myer, Vol. II, pp. 193, 254. <sup>2</sup> *Psychology*, pp. 50—52, 21, 51; 27.

<sup>3</sup> *Naturalism and Agnosticism*, Ward, Vol. II, pp. 254—257; *Philosophy*, pp. 181—185, 351, 120, 137.

<sup>4</sup> *Ibid.*, pp. 181, 198, 191, 221, 220; *Psychology*, 214; *Mental and Moral Science*, Bain, 437, 442, 495, 346.

<sup>5</sup> *Psychology*, pp. 140—142, 177, 191, 219, 241; *Philosophy*, 182, 183; *The Human Mind*, Sully, Vol. II, pp. 234, 310, 311; *Mental and Moral Science*, pp. 215, 238, 386, 222; *Naturalism and Agnosticism*, Vol. II, 281, 249.

be described as a faculty of the Mind "centrally initiated," which has to do with the regulation of mental functions, "paripherally-initiated," and thereby we are enabled to rise to the knowledge of truth, of good taste, and of right conduct—and in this knowledge we find the philosophic basis for Responsibility.<sup>1</sup>

We may now proceed to inquire into the nature of Knowledge, and how we come to possess that knowledge and power of control which raises us to a position of moral and, as a consequence, legal responsibility.<sup>2</sup> But first it is of importance to notice some of the relations entering into the currently-accepted threefold division of Mind. Feeling and Conation have been described as forming "the two poles of consciousness," Intellection lying between them,<sup>3</sup> in respect of the quality of activity: feeling, or being affected or excited, is predominantly passive; conation or willing is characteristically active; "intellection also implies activity." The question has been asked whether conation be, in fact, a distinct phase of mind equally with the other two: "directly or indirectly, . . . you will always find an element of feeling involved in conation, together with intellectual representation."<sup>4</sup> The fact seems to be that the primitive elements of will are all that we can get from the natural faculties (comprised in the primary functions of Mind), and that evidence of the matured will must be sought for in the spiritual faculties of mind.<sup>5</sup> And here it seems that a clear distinction ought to be taken between a mere striving after or desiring to act—activity impelled by inclination, instinct or appetite, and "volition of a developed type"—the purposed choice of means to an

<sup>1</sup> *Naturalism and Agnosticism*, Vol. II, pp. 225—228; *Psychology*, 199; *Philosophy*, 183, 187, 189; *Life and Matter*, Lodge, 84, 81.

<sup>2</sup> *Psychology*, pp. 237, 241, 243; *Philosophy*, 97, 98, 99, 187, 189; *Naturalism and Agnosticism*, Ward, Vol. II, pp. 221, 250, 254, 256, 272—276.

<sup>3</sup> *Psychology*, pp. 23, 25, 186, 21, 22.

<sup>4</sup> *Ibid.*, pp. 21, 187, 25, 186, 88, 23, 221, 222, 220.

<sup>5</sup> *Mental and Moral Science*, pp. 2, 68, 318, 325.

end as the outcome of reason.<sup>1</sup> This seems to point to a position of essential importance in the evolution of volitional control. Bain<sup>2</sup> has stated the primitive elements of the will to be (1) the spontaneity of movement, and (2) the law of self-conservation—the will becoming matured by a process of education: but, when Bain comes to consider how the Will is to be controlled, he seems to have no better explanation to offer than that the Feelings come under command by training and the Thoughts by attention; and, no doubt, this may be taken to be a fair description of what takes place in the animal organisation. We are led, therefore, to the conclusion that the natural faculties, as centred in body and soul and described as the three primary functions of mind, give us no higher warrant of Responsibility than that of following natural instincts and inclinations. We have to seek, then, in the higher faculties of the Mind, as centred in the spirit of man, and exemplified in reason and moral sense, for the self-conscious unity in which Responsibility has its seat.

#### IV.

We have seen, in our *résumé* of psychological science, how the natural man in thought advances by way of perception representative imagination and conception<sup>3</sup>; how in conation his activity is promoted by a certain spontaneity of movement and by a certain primitive instinct of self-conservation;<sup>4</sup> and how in feeling he may be affected by certain bodily or mental experiences which have a bearing upon both thought and action;<sup>5</sup> and in these processes we have the groundwork of all his Mental States.

The attempt has been made, by those holding more or less

<sup>1</sup> *Psychology*, pp. 221, 222, 237, 238, 23.

<sup>2</sup> *Mental and Moral Science*, pp. 318, 325, 337, 79, 80; 338, 339, 241, 218, 226—228; 82, 89; 2, 68.

<sup>3</sup> *Psychology*, p. 165. <sup>4</sup> *Mental and Moral Science*, pp. 79, 80; 318, 322; 218.

<sup>5</sup> *Ibid.*, pp. 215, 217, 218, 227, 228.

of a materialistic view of the origin of mind in physiological changes,<sup>1</sup> to trace a continuous series of acquisitions, under laws of contiguity and of association, whereby the lower faculties of the mind become gradually merged in the higher, and thereby to account for the possession by man of reasoning and moral powers. It is difficult to see how the duality of body and soul, which we have seen affected in different ways under the processes of perception and representation, can be overcome except by the working of a higher law—a higher law which cannot have its source in those factors or elements which it transcends and unifies<sup>2</sup>; but, so soon as we conceive man as a being endowed with lower faculties in respect of his animal nature and with higher faculties in respect of his spiritual nature, the difficulty vanishes. It is in this fundamental distinction, this division of the human mind into lower and higher faculties—the one group having their course in the animal nature, the other in the spiritual—that we have traced out the psychological and philosophical bases of Responsibility; and it is in this distinction that we may hope to discover the solution of the mystery which has enveloped any definition or satisfactory explanation of the varying states of responsibility and irresponsibility. When we have come to see that the action of our purely animal faculties imposes on us no sense of moral responsibility but that of animal inclinations and instincts; and that the action of our spiritual faculties, when allowed free scope, control and govern the action of the lower; we shall come to see that in this freedom of control, by the higher faculties of the lower, is contained the essential condition of responsibility.

The possession, then, of the lower faculties of body and soul by the higher faculties of spirit is necessary to a sense of responsibility. If the possession became impaired, either by reason of the inefficiency of the bodily and mental organism

<sup>1</sup> *Ibid.*, pp. 82, 85, 114, 127, 143, 151, 161, 176, 181, 188, 197, 198.

<sup>2</sup> *Essays*, Caird, Vol. II, pp. 428, 430, 431.

on one side, or by reason of the lapse or dormancy of the controlling spirit on the other, the effect may be either to leave the organism disordered in its bodily and mental functions by disease, or to leave it unpossessed by reason and moral sense. Irresponsibility, then, may arise either from the mental functions being disordered by bodily disease, or from the shutting off from soul and body of the spiritual control of reason and moral sense. In the former case, the chief characteristics are those of delusion and illusory suggestion; in the latter case, those of possession by the fixed idea and otherwise.<sup>1</sup>

Having thus so far dealt with the subject of control, we may go back to where we left off, when we found in a knowledge of the good, the beautiful, and the true,<sup>2</sup> a philosophic basis for the conception of Responsibility, and take up the subject of Knowledge by an inquiry into its nature and how we come by it. We may then be able to see how, by way of Knowledge, arises that freedom of choice in which Responsibility consists.

RANKINE WILSON.

*(To be continued.)*

## II.—THE LAW RELATING TO TRADE UNIONS.

**D**URING the last few years there has been a number of very important decisions on the subject of Trade Unions. The general impression as to the legal rights and attributes of those bodies has received some severe shocks. People interested in Trade Unionism not unjustly complain that the law is now in such a state of chaos that they do not know where they stand. Various proposals have been made with a view to altering the law, and bills

<sup>1</sup> *Human Personality*, Myers, Vol. I, pp. 40, 41, 51; *Mental and Moral Science*, Bain, pp. 91, 279, 351, 218, 442; *The Human Mind*, Sully, Vol. II, pp. 322, 323. <sup>2</sup> *Life and Matter*, Lodge, pp. 84—88; *General Philosophy*, pp. 181, 182.

have been introduced into Parliament with that object. But no one who has read the discussions in the House of Commons, and the speeches made at public meetings about Trade Unions, can fail to observe that very hazy notions prevail as to the exact legal position of those bodies at the present time. This haziness greatly militates against effective discussion and action on the part of Trade Unionists. Those who advocate fresh legislation with regard to Labour, ought first to be perfectly clear as to the actual state of the law at the present moment. There is, of course, a large body of Trade Union law, about which there is no difficulty. On many matters the law is quite clearly set forth in the Statutes, and there is no dispute as to its provisions. But there are other and numerous branches of the subject, on which a concise statement of the law, as it now exists, should be useful. It will be the endeavour of the present writer to give a brief digest of Trade Union law, leaving the reader to refer to the Statutes and decisions for details.

In discussing this subject, it is important first of all to understand clearly what a Trade Union is. It is defined by Statute as any combination, whether temporary or permanent, for regulating the relations between workmen and masters, or between workmen and workmen, or between masters and masters, or for imposing restrictive conditions on the conduct of any trade or business. Formerly a Trade Union was unlawful, if any of its objects was in restraint of trade. This disability is now removed, and no member of a Trade Union is liable to criminal prosecution for conspiracy or otherwise, and no agreement or trust is void or voidable on the ground of its being in restraint of trade.<sup>1</sup>

By the Trade Union Act of 1871<sup>2</sup> provision was made for the registration of Trade Unions, and any seven or more members may, by subscribing their names to the rules of

<sup>1</sup> 39 & 40 Vict., c. 22, s. 16.

<sup>2</sup> 34 & 35 Vict., c. 31.

the Union, and otherwise complying with the provisions of the Act, register such Trade Union. If, however, any one of the purposes of such Trade Union be unlawful, such registration is void.<sup>1</sup>

The Chief Registrar of Friendly Societies is the only person who can withdraw or cancel a certificate of registration, and he can only do so in the following cases: (1) At the request of the Trade Union, to be evidenced in such manner as the Chief Registrar shall from time to time direct; or (2) On proof to his satisfaction that a certificate of registration has been obtained by fraud or mistake, or that the registration of the Trade Union has become void through some one of the objects of the Trade Union being unlawful, or that such Trade Union has wilfully, and after notice from the Chief Registrar, violated any of the provisions of the Trade Union Acts, or has ceased to exist. Not less than two months' previous notice in writing, specifying briefly the ground of any proposed withdrawal or cancelling of certificate, must be given by the Chief Registrar to a Trade Union, before its certificate of registration can be withdrawn or cancelled (except at its request). But if the certificate is shown to have become void, it is the duty of the Chief Registrar to cancel it forthwith.<sup>2</sup>

The members of Trade Unions are under certain disabilities as regards suing or being sued. By sect. 4 of the Trade Union Act of 1871 no Court can entertain any legal proceedings instituted with the object of directly enforcing or recovering damages for the breach of any of the following agreements, namely, (1) Any agreement between members of a Trade Union as such, concerning the conditions on which any members for the time being of such Trade Union shall or shall not sell their goods, transact business, employ, or be employed. (2) Any agreement for the payment by any person of any subscription or penalty to a Trade Union.

<sup>1</sup> *Ibid*, s. 6.

<sup>2</sup> 39 & 40 Vict., c. 22, s. 8.

(3) Any agreement for the application of the funds of a Trade Union, (A) to provide benefits to the members, or (B) to furnish contributions to any employer or workman not a member of such Trade Union, in consideration of such employer or workman acting in conformity with the rules or regulations of such Trade Union. (4) Any agreement between one Trade Union and another. (5) Any bond to secure the performance of any of the above-mentioned agreements. But none of the above-mentioned agreements are unlawful, although they cannot be sued upon.<sup>1</sup>

Under the section just cited no member of a Trade Union can sue for any benefits, however strongly entitled to them he may be from a moral point of view, and various attempts have been made to evade that provision, but without success. But while an agreement for the application of the funds to provide benefits to members cannot be "directly enforced," it was decided in *Howden v. Yorkshire Miners' Association*<sup>2</sup> that the misapplication of the funds of a union may be prevented by injunction. In that case a Trade Union was established for objects which included payment to members locked out or on strike, and the whole of the funds were to be applied in carrying out the specified objects according to the rules. The Trade Union misapplied part of the funds by payments of strike money in cases not authorised by the rules, and an injunction was granted to one of the members restraining the Trade Union and its trustees from making the payments.

A Trade Union is not permitted to purchase or take upon lease more than one acre of land. But every branch of a Trade Union is considered as a distinct Trade Union for the purposes of this section. The word "purchase" means "buy for money," and does not include the acquisition of land by gift or devise or bequest.<sup>3</sup> A Trade Union cannot

<sup>1</sup> 34 & 35 Vict., c. 31, s. 4.

<sup>2</sup> (L. R. [1905], A. C.).

<sup>3</sup> *In re Amos, Carrier v. Price* ([1891], 3 Ch. 159).



take land by gift or inheritance. All real and personal estate belonging to a registered Trade Union is vested in the trustees of the Trade Union for the use and benefit of the Union and its members. The real or personal estate of any branch of a Trade Union is vested in the trustees of such branch and is under their control, unless the rules of the Union provide that it shall be vested in the trustees of the Union.<sup>1</sup>

A registered Trade Union may be sued in its registered name. An unregistered Union may be sued in a representative action, if the persons selected as defendants be persons who, from their position, may be taken fairly to represent the body. A mandamus may go against a Trade Union to compel it to perform the duties cast upon it by statute.<sup>2</sup> In any matter affecting the property of a registered Trade Union, the trustees or any other officer of the Union, who may be authorised so to do by the rules, may sue or be sued in any legal proceedings. They may be sued in their proper names without other description than the title of their office.<sup>3</sup>

A Trade Union may start and run a newspaper. If the trustees of a Union have been registered as proprietors of a newspaper, carried on in the interests of the members of the Union, they are liable in damages for a libel in that newspaper and are entitled to be indemnified out of the funds of the Union.<sup>4</sup>

A Trade Union is responsible for the acts of its agents. In the *Taff Vale Railway Company v. Amalgamated Society of Railway Servants*,<sup>5</sup> it was decided that if men acting as agents of a Union in the furtherance of a strike, sanctioned and conducted by the Union through its authorised officers, commit wrongful acts, the Union is responsible, and an

<sup>1</sup> 34 & 35 Vict., c. 31, s. 8; 39 & 40 Vict., c. 22, s. 3.

<sup>2</sup> *Taff Vale Railway Company v. Amalgamated Society of Railway Servants* (L. R. [1901], A. C. 426).

<sup>3</sup> 34 & 35 Vict., c. 31, s. 9.

<sup>4</sup> *Linaker v. Pilcher* ([1901], 17 T. L. R. 256). <sup>5</sup> (L. R. [1901], A. C. 426).

injunction may be granted against such Union. A judgment or order against a Union in its registered name can, of course, only be enforced against the property of a Union, and, if it is necessary, the trustees of the Union may be sued. The decision of the House of Lords in the *Taff Vale Case* excited much hostility, and there is no doubt that pressure will be brought to bear upon the Government to nullify that decision by fresh legislation.

A Trade Union may not "intimidate." By the Conspiracy and Protection of Property Act of 1875,<sup>1</sup> it is provided that every person who, with a view to compel any other person to abstain from doing or to do any act which such other person has a legal right to do or abstain from doing, wrongfully and without legal authority (1) uses violence to or intimidates such other person or his wife or children, or injures his property, or (2) persistently follows such other person about from place to place, or (3) hides any tools, clothes, or other property, owned or used by such other person, or deprives him of or hinders him in the use of them, or (4) watches or besets the house or other place where such other person resides, or works, or carries on business, or happens to be, or the approach to such house or place, or (5) follows such other person with two or more other persons in a disorderly manner, in or through any street or road, commits a criminal offence, and is liable to fine or imprisonment. Attending at or near the house or place where a person resides, or works, or carries on business, or happens to be, or the approach to such house or place, in order merely to obtain or communicate information, is lawful, and is not such a watching or besetting as to make the party doing it criminally liable.

There are numerous decisions as to what does and what does not constitute intimidation. If A, the agent of a Trade Union, tells B, an employer, that the members of the Trade

<sup>1</sup> 38 & 39 Vict., c. 86, s. 7.

Union in B's employment will strike unless X, a workman in B's employment, joins the Union, and B, in order to avoid a strike, dismisses X, on his refusal to join the Union, A is not guilty of "intimidation" towards X.<sup>1</sup> If A tells B that he will call out the members of the Union in B's employment, if B does not cease employing non-union men, and, on B's refusal, calls out the members of the Union, at the same time bidding them use no violence or immoderate language, and telling them quietly to cease work and go home, A is not guilty of "intimidation" toward B.<sup>2</sup> A, however, is guilty of "intimidation," if he uses violence or uses language so as to make B afraid,<sup>3</sup> or if he threatens to picket, that is to watch and beset B's workshop, so as in fact to intimidate B by his threat.<sup>4</sup>

It is illegal to picket the works or place of business of a man by persons who are distributed and placed there for the purpose of trying by persuasion, peaceable or otherwise, to induce the workmen of that man not to work for him any longer, or to induce people who want to work for him to abstain from entering into an agreement with him to do so.<sup>5</sup> It is illegal and a nuisance at Common law to watch and beset a man's house with a view to compel him to do or not to do what is lawful for him not to do or to do, unless some reasonable justification for it is consistent with the evidence.<sup>6</sup> An act which, if done by a single individual, would not be actionable, may become actionable if done by many. Annoyance and coercion by many may be so intolerable as to become actionable, and produce a result which one alone could not produce.<sup>7</sup> To beset one person's house with a view to compel some one else is illegal.<sup>8</sup> Watching and

<sup>1</sup> *Gibson v. Lawson* (L. R. [1891], 2 Q. B. 547).

<sup>2</sup> *Curran v. Treleavan* (L. R. [1891], 2 Q. B. 545).

<sup>3</sup> *Judge v. Bennett* ([1887], 52 J. P. 247).

<sup>4</sup> *Gibson v. Lawson* (L. R. [1891], 2 Q. B. 547).

<sup>5</sup> *Kay, J.*, in *Lyon v. Wilkins* (L. R. [1896], 1 Ch. 811).

<sup>6</sup> *Ibid.* (L. R. [1899], 1 Ch. 255).

[1 Ch. 255].

<sup>7</sup> *Quinn v. Leatham* (L. R. [1901], A. C. 495). <sup>8</sup> *Lyon v. Wilkins* (L. R. [1899],

besetting may be illegal, even although it lasts for but a short time.<sup>1</sup> The phrase, "place where such other person . . . happens to be," in 38 & 39 Vict. c. 86, s. 7, embraces "any place where the workman is found, however casually," and is not limited to "a place habitually frequented by the workman."<sup>2</sup>

It is lawful for a Trade Union to promote a strike. If two or more persons agree or combine to do, or procure to be done, any act in contemplation or furtherance of a trade dispute between employers and workmen, they cannot be indicted for conspiracy, if such act committed by one person would not be punishable as a crime.<sup>3</sup> But although such an agreement or combination is not indictable as a conspiracy, the persons who have entered into it may be liable to civil proceedings.<sup>4</sup> And while it is lawful for workmen to combine not to work except on their own terms, it is unlawful for workmen to combine to prevent others from working.<sup>5</sup> Persons, who have been guilty of riot, unlawful assembly, breach of the peace, or sedition, or any offence against the State or the Sovereign, are still criminally liable.<sup>6</sup>

If, in the case of a dispute between an employer and a Trade Union, a person does a lawful act with a malicious or bad motive, his act does not thereby become unlawful, and he is not liable to a civil action. Consequently, no action for a conspiracy lies against persons who act in concert to damage another, and do damage him, but at the same time merely exercise their own rights and infringe no rights of other people.<sup>7</sup> But it is a violation of right to induce a person to commit a breach of contract, or interfere with contractual relations recognised by law,

<sup>1</sup> *Charnock v. Court* (L. R. [1899], 2 Ch. 35).

<sup>2</sup> *Ibid.*

<sup>3</sup> 38 & 39 Vict., c. 86, s. 3; Kay, L. J., in *Lyon v. Wilkins* (L. R. [1896], 1 Ch. 829).

<sup>4</sup> *Quinn v. Leatham* (L. R. [1901], A. C. 495).

<sup>5</sup> *Ibid.*

<sup>6</sup> 38 & 39 Vict., c. 86, s. 3.

[495].

<sup>7</sup> *Allen v. Flood* (L. R. [1898], A. C. 1); *Quinn v. Leatham* (L. R. [1901], A. C.

if it is done maliciously or if there be no justification for the interference. The principle is not confined to contracts of service.<sup>1</sup> If wrongful and unjustifiable interference with contractual relations recognised by law is intended to injure, and in fact damages a third person, such third person has a remedy by action.<sup>2</sup> But a combination of different persons in pursuit of a trade object is lawful, although resulting in such injury to others as may be caused by legitimate competition in labour.<sup>3</sup> The justification which will be sufficient to exonerate a person from liability for his interference with the contractual rights of another, must be an equal or superior right in himself, and it will not be sufficient for him to show that he acted *bonâ fide* or without malice, or in the best interests of himself or others, or on a wrong understanding of his own rights.<sup>4</sup>

The law as stated in the last paragraph has been exemplified in several decisions. In *Temperton v. Russell* it was decided that it is unlawful for the agents of a Trade Union, which has a dispute with X, to prevent Y from working for X or supplying materials to X, by withdrawing or threatening to withdraw from Y's employment the workmen belonging to the Union.<sup>5</sup> In *Quinn v. Leatham* it was decided that, if the agent of a Union, in furtherance of the objects of the Union, wrongfully and maliciously induces customers of X, who is not a member of the Union, to cease to deal with X, and induces servants of X to leave his employment, an action for damages will lie.<sup>6</sup> In *South Wales Miners Federation v. Glamorganshire Coal Company*<sup>7</sup>

<sup>1</sup> *Lumley v. Gye* ([1853], 2 E. & B. 216); Bowen, L.J., in *Mogul Steamship Co. v. McGregor, Gow & Co.* (L. R. [1889], 23 Q. B. D., at p. 614); Lord Halsbury, in *Allen v. Flood* (L. R. [1898], A. C., at p. 74); Lord MacNaghten in *Quinn v. Leatham* (L. R. [1901], A. C. 495). <sup>2</sup> *Quinn v. Leatham* (L. R. [1901], A. C. 495).

<sup>3</sup> Lord Shand, in *Quinn v. Leatham* (L. R. [1901], A. C., at p. 512).

<sup>4</sup> *Read v. Friendly Society of Operative Stonemasons* (L. R. [1902], 2 K. B. 88).

<sup>5</sup> *Temperton v. Russell* (L. R. [1893], 1 Q. B. 715); Kay, L.J., in *Lyon v. Wilkins* (L. R. [1896], 1 Ch. 811).

<sup>6</sup> *Quinn v. Leatham* (L. R. [1901], A. C. 495). <sup>7</sup> (L. R. [1905], A. C. 239).

it was decided that, where members of a Union employed in collieries, without giving notice to their employers, and in breach of their contracts, abstain from working on certain days upon the direction or order of the Union, given by its executive council (the Union acting honestly and without malice or ill-will towards the employers, and only with the object of keeping up the price of coal by which the wages are regulated), the action of the Union and its officers is not justifiable, and they are liable in damages.

J. A. LOVAT-FRASER.

### III.—OUR LOCAL RECORDS : A POLICY.

THE extraordinary series of frauds and forgeries perpetrated a few years ago in the Shipway pedigree case resulted in the appointment in 1899 by the First Lord of the Treasury of a Departmental Committee, to investigate in a general manner the state and condition of local records throughout the country, and to advise what steps ought to be taken for their better preservation. For this purpose the Committee proceeded to obtain evidence by circulating two sets of questions dealing respectively with both aspects of the enquiry. Besides being sent to miscellaneous recipients, such as learned societies and private individuals, these questions were sent to 720 public authorities in England, Scotland, and Ireland, *e.g.*, County Councils, Municipal Corporations, and various ecclesiastical authorities: though it may be noticed that no enquiries were directed to the Probate Registries, an omission the more remarkable since it was at the Probate Registries that some of the most notorious forgeries in the Shipway case were perpetrated. Of these 720 authorities only 404 troubled to send in replies, and it is probably not unfair to assume that the records of

the remaining authorities are in a less satisfactory state than those whose officers were sufficiently interested to send in replies in detail. As a result, a vast amount of information has been collected together and rendered generally available in an Appendix to the Committee's Report. Considered broadly, the result is that we find that the repositories of local records are far too many in number, often in buildings which are not fire-proof, and with very inadequate means for their safe or convenient production to those desiring to consult them. Indeed the *use* of public records such as obtains at the Public Record Office, London, may be said as a general rule to be practically non-existent.

As regards future positions of the question and suggestions for improvement, there appears to be a pretty general consensus of opinion that local centralization would be desirable, but this is somewhat qualified by the views of many counties and boroughs that they ought to retain the custody of their own respective records. In many instances it is probable, as pointed out by the Committee, that those answering did not sufficiently distinguish between records in current use and those which are obsolete or mainly of historical value, and probably the replies were dictated by fear lest they should lose the charge of documents required for current business. Then there are parish registers and parish records scattered amongst some ten thousand or more repositories, exposed to innumerable risks, and consequently rarely perfect, and to which access is obviously difficult. The evidence adduced by experts and other independent observers is very decided as to the great need there is for improvement. Further, they generally advocate local centralization in properly constituted offices, as the only efficient means of preserving our local records and rendering them accessible.

The Report of the Departmental Committee deals with various suggestions, to three of which special prominence is

given. The first is that of constituting the Universities as the centres of Record areas, on the ground that they would reconcile local jealousies and provide neutral repositories. It is, however, obvious that the areas to be attached to each would be unwieldy, and though, clearly, it would be suitable that a Record office would best be in a centre with a highly educated population, the Committee conclude, and rightly so, that the proposal is not feasible.

The next suggestion, that of grouping the counties in Record districts, meets with the Committee's strong approval, but they point out that the reluctance of the counties and boroughs to part with their records forms a considerable objection to such a combination for the present, at any rate, economical and convenient as obviously it would be, and therefore the Committee fall back on what they call the county and borough scheme, viz., to allow the County Councils to be the record authorities for the respective counties, and similarly as to the boroughs, and that power should be conferred on them of receiving parish registers if so ordered by the bishop. Further, the Committee suggest that other public authorities should be encouraged to deposit their Records in the appropriate office, and they suggest that Inspectors of local record offices should be appointed. The Committee deprecate any attempt to compulsorily remove records to local offices, and rely on the increasing interest in such matters to work gradually an improvement in the existing state of affairs.

It is to be feared that the Report in this respect is far too sanguine, and indeed, unless some definite policy for the future be initiated it may be regarded as absolutely certain that matters will go on much as they have done in the past. The authorities are too numerous, and the controlling powers usually too little interested in the non-current records for us to expect, save in exceptional cases, that they should take any active steps. It should be



remembered that it was not until the Government decided on the formation of the Public Record Office, and adopted the policy of separating obsolete records from current business, that any real improvement took place as regards national records. Previously their condition was extremely deplorable.

What, then, is the policy which may be suggested as suitable. First, let us consider the essentials. They seem to be :—

- (1) Safe custody, *i. e.*, fire and damp-proof repositories.
- (2) Concentration at suitable centres.
- (3) Separate custodians for obsolete, *i. e.*, historical records, *i. e.*, those not required for current business. In other words, Record makers should not be Record keepers.
- (4) Accessibility for those wishing to consult the records.

Having these four salient points before us, and bearing in mind that any compulsion for transference of records from their present custodians must be avoided, is it possible to frame a definite policy which shall have the effect of preserving our local records, and gradually, by common consent, of concentrating them in suitable offices?

In the first place, it will be needful to constitute some central authority charged with the duty of making the necessary regulations relative to Local Records, and also of seeing them carried into effect. A suitable Board of three or four permanent Commissioners might be constituted under one or other of the following great officials: the Lord Chancellor, the Master of the Rolls, or the President of the Local Government Board. In this Board might be vested the appointment of officers charged with the inspection of local record offices, and also the keepers of the various district record offices. Having regard to local feeling it might be expedient to empower the Board to nominate

certain of the existing repositories of records to be the District Record Offices, with power to receive into their custody (with or without power of withdrawal) all other local records within their jurisdiction. This privilege should, on application, be granted only to County Councils or county boroughs, and then only if their record offices complied with the regulations laid down by the Board. These regulations should include the provision of a suitable fire-proof and damp-proof building under the care of an acting keeper, who should be an archivist able to read the records in his care and not concerned with current business. Further, in any office appointed as a District Record Office there should be adequate accommodation for the public desiring to consult the records deposited, whether for legal or literary purposes, such as is now afforded by the Public Record Office.

In counties where no suitable record office already existed, and the Councils were unwilling to provide depositories, it should be optional for the Central Board, with the consent of the Treasury, to erect a suitable office with a proper staff, in which *all* local records could be deposited from time to time. Such an office ought to include in its district several counties as the local circumstances might suggest. To it would be drafted, but with the assent of the various authorities, all local records of whatever nature, and thither also private owners might send their ancient records for safe custody. Modern documents, such as are usually placed in a safe deposit, would of course be excluded. Although such a district office were established, still the local authorities should be allowed to retain their records if they thought fit. The refusal of a County Council to comply with the regulations entitling their office to be appointed a district office, would be no reason for depriving them of the custody of their own records, though it would be a very good reason for not granting them the privilege of taking charge of those

of other people. It may, however, be regarded as pretty certain that they would either seek to be appointed the district record authority, or would apply to place their own records in the district office. It is probable that the alleged unwillingness of the clergy and other local authorities has been somewhat exaggerated, and that, on the contrary, many (unless possibly those interested as antiquaries) would be very willing to rid themselves of the responsibility of caring for their obsolete records. Already instances of this may be quoted. Certain local ecclesiastical records have been deposited "for safe custody" in the Dublin Record Office, and the Bodleian Library has become the repository of others.

Such District Record Offices would in many ways be convenient. By such means the Government might relieve the pressure on London repositories by drafting to the District Offices records which are distinctively local. Combination could be effected with the Charity Commissioners and Ecclesiastical Commissioners, who might be willing to transfer to such offices Diocesan Records instead of providing separate offices as provided by the Diocesan Records Bill of 1900, and doubtless some arrangement might be made with these other authorities for sharing the needful expenses which should be largely, if not entirely, covered by the fees received for searches and certificates required for legal business.

It would be needful to appoint some travelling commissioners whose duty it should be to examine and inspect all depositories of local records and to report thereon from time to time to the Central Board. They would moreover have to consider all such questions as the suitability of the buildings, their safety, the arrangement of the various collections of records, what offices should be appointed District Record Offices, and so forth. Further, they should be charged with the general supervision of the various district offices, that is, those established by the

Government. Over other offices they should have no control, their functions being merely advisory and confined to the issue of reports of their visits thereto. Though of course these commissioners should be experts able to read documents, obviously they should be something more than the administrative custodians of record offices, since by them the policy of the Central Board would be largely influenced.

Perhaps it may be suggested that it would be a useful experiment were the Government to appoint some temporary commissioners to inspect local record depositories, and also to establish one or two Government District Record Offices in some suitable centres. Such experimental centres might be found at London and Oxford, at each of which places offices might be placed and made available, in the one case for the home counties, and in the other for the three counties of Oxon, Berks, and Bucks. For the London office a site could be readily and appropriately found in Chancery Lane close to the Public Record Office. Negotiations might be opened with the various authorities for placing their records therein, just as for safe custody certain Archdeaconry records have already been deposited in the Bodleian Library. The preliminary arrangements and organization of such an office would of course devolve on the Commissioners. Before long it may be confidently predicted that various local authorities would be found anxious to deposit therein their obsolete records, especially if the right of withdrawal were secured to them. And on the establishment of such an office it would be possible to restore to Oxford the local Probate records which some years ago were removed to London. Such a return would doubtless be appreciated there. Parish registers could be deposited at once with the assent of the bishop of the diocese. And it would not be difficult to make equitable provision for any vested interest the clergy may have in fees arising therefrom.

These suggestions might be elaborated, but it is not necessary to do this, as our object is merely to indicate the outline of a definite policy which, without using any compulsion, and leaving wholly intact the rights of local authorities to retain their documents, would gradually bring about a system by which our parish registers and other records would be saved from destruction, and at the same time rendered available to those wishing to consult them. By means of such a definite policy as this, in the course of a few years the vast bulk of local records would be deposited in a few convenient centres under competent guardianship, instead of being scattered over some twenty or thirty thousand or more repositories, few indeed of which can in any sense be described as either safe or fire-proof. Less than a dozen offices would suffice for England and Wales.

If the suggested local offices at London and Oxford answered the expectations which it is reasonable to entertain, other District Record Offices would doubtless be established.

At present the vast majority of custodians are quite unable to read the early records in their care. Many do not even know what they possess. Indeed it is rarely possible to obtain reliable certificates of early entries in parish registers, for the sufficient reason that as a general rule the clergy cannot read them with adequate facility.

All this might be remedied by means of the establishment of District Offices in a few appropriate centres. And in carrying out this policy there is no need to use compulsion, or without their consent to take from existing authorities the documents in their possession.

Finally, is it too much to expect that the policy of better care of our ancient local records, which was initiated by the enquiries of the late Government, may be continued and completed by their successors? These ancient local records are the heritage of all classes of the people; indeed, our kindred

beyond the seas are interested in them equally with ourselves. Happily all political parties are agreed that it is a national duty to make adequate and proper provision for safe-guarding these priceless records of our past history. Therein lies the hope that, ere long, we shall see chaos and neglect replaced by an appropriately organised system of District Record Offices.

W. P. W. PHILLIMORE.

#### IV.—THE PROVINCE OF THE JUDGE AND OF THE JURY.—PART III.

(Continued from page 204.)

##### LILBURN'S TRIAL IN 1649.

##### THE COMMISSION.

HE was tried at the Guild Hall, London, on Wednesday, Thursday, and Friday, the 24th, 25th, and 26th October, 1649, before a Special Commission, consisting of thirty-nine members, of whom seven were Common law Judges, three Serjeants-at-law, and nine Aldermen of the City, besides the Lord Mayor, Recorder, and Common Serjeant. Keeble,<sup>1</sup> one of the Keepers of the Great Seal, was the President of the Court. He was not a strong man, and the control of the proceedings seems to have been almost taken out of his hands by Jermyn,<sup>2</sup> a "Justice

<sup>1</sup> KEEBLE, RICHARD. "Soon after his appointment (as one of the Commissioners of the Great Seal), he presided at the curious trial of Colonel Lilburne, and he seems to have acted with less severity and unfairness than some of the judges who were joined in commission with him."—Foss; *Biographia Juridica*, p. 380.

<sup>2</sup> JERMYN, PHILIP. "In the extraordinary trial of Lieutenant-Colonel Lilburne in October, 1649, at which the Lord Commissioner Keeble presided, Jermyn was one of the Commissioners, and took a prominent and violent part against the prisoner, almost superseding the president."—Foss; *Biographia Juridica*, p. 377.

of the Upper Bench" (this being the name into which the King's Bench had been transformed). With this imposing array of Commissioners, well might Lord Keeble say, as he did in the course of the trial, "Mr. Lilburn, I shall add this more to it, that you this time have such a Court, which never any of your condition ever had in England. So many grave judges of the law." But Lilburn was by no means abashed by this, and retorted:—

"*Lieut.-Col. Lilburn*: Truly I would rather have had an ordinary one, Sir, I mean a Legal and Ordinary Assizes or Sessions.

"*Lord Keeble*: But this you have, and this is to take off or prevent that which you would now do, if there had been one judge and no more, and if you had not had this great presence of the Court, you would have been male-part, and have out-talked them; but you cannot do so here.

"*Lieut.-Col. Lilburn*: Truly, Sir, I am not daunted at the Multitude of my Judges, neither at the glittering of your scarlet robes, nor the Majesty of your Presence and Harsh, Austere Deportment towards me; I bless my good God for it who gives me Courage and Boldness." (*Lilburn's Tryal*, p. 104.)

The Court and its approaches were guarded by a strong force of soldiers, and the Guild Hall was crowded with spectators, scaffolds having been specially erected for their accommodation.

### THE GRAND JURY.

Notwithstanding the statement made on the title page of *Lilburn's Tryal* that "the names of the Judges, Grand Inquest and Jury of Life and Death" are therein contained, the names of the Grand Jurors are not given in the second edition, nor is there anything said about the proceedings before the Grand Jury on Wednesday, the 24th October; but we know that the whole of the first day (October 24th) was

occupied by the proceedings before the Grand Jury, and that in the end a True Bill was found. If, however, the account given by some of Lilburn's friends can be relied on, some of the Grand Jurors did not regard all the charges laid against him as true. On the morning of the second day (Thursday) Lilburn said: "I beseech you, Sir, let me hear but the Grand Jury speak, for I understand from some of themselves they never found me Guilty of Treason, but do conceive themselves wronged by some words yesterday, that passed from some of the Judges; I pray you let me hear them speak." (*Lilburn's Tryal*, p. 47.) This request was refused, and the Cryer was ordered to call the Jury. "Mr. Lilburn earnestly pressed to be heard but could not." The members of the Grand Jury were described by Mr. Prideaux as "men of integrity, men of ability, men of knowledge."

In the footnote to Prof. Gardiner's History (3rd ed., 1901, p. 184), before referred to, it is further stated: "subsequently appeared the second part of the Trial of Lieut.-Col. John Lilburn (E. 598, 12), adding an account of the proceedings which took place before the Grand Jury on the 24th, and containing errata as well as additions to the former report of the proceedings on the 25th and 26th. These additions are not to be found in the reproduction in the State Trials, where, moreover, the date is wrongly given." The reason for this is, that the report in the *State Trials* is a reproduction of the second edition of *Lilburn's Tryal*. As to the statement that the date is wrongly given, the trial proper began on the "25th October being Thursday," and was continued on the "26th October being Friday, the second day." Prof. Gardiner has been misled by a printer's error in the *State Trials*. The first day of the trial is there said to be the "24th Oct., 1649, being Thursday." (This should be the 25th Oct.) The second day of the trial is correctly described as "Oct. 26th, 1649, being Friday," that is to say, the day of the month is wrongly given, but the day of the week is correctly stated.



## THE PROCEEDINGS ON THE SECOND DAY.

The trial proper began on Thursday, the 25th October, but nearly the whole of this day was taken up with a long wrangle before Lilburn could be got to plead. "On the morning of the 25th John Lilburn took his place at the Bar. Voluble and pugnacious, he had a memory well stored with legal lore, and an absolute contempt for the time-honoured commonplaces which passed as legal wisdom. He soon discovered that the Court which was to try him was as much upon its defence as he was himself, and would be loth to interrupt him lest any appearance of harshness should alienate the jury." (Gardiner, *Hist. Commonwealth*, Vol. I, p. 184.) This day's proceedings are extremely interesting, as in their course Lilburn raised several important principles of English law. His main attack was upon the legality of the Commission under which he was tried, but incidentally he raised the right of prisoners to have a copy of the indictment and to be defended by Counsel, or at least to have Counsel assigned to them to advise them as to the legality of the indictment before they pleaded thereto. He protested most vigorously against the interrogation of prisoners by the law officers of the Crown, and he spoke strongly in support of the publicity of criminal proceedings. He pleaded earnestly for what he regarded as a fair trial:

"Truly, Sir" (said he, addressing Lord Keeble), I am upon my life, and shall my Ignorance of the Formalities of the Law in the practice part thereof destroy me? God forbid! therefore give me but leave to speak for my Life or else knock me on the head, and murder me where I stand, which is more Righteous and Just than to do it by pretence of Justice" (*Lilburn's Tryal*, p. 21). Again: "I have no more to say to you, you may murder me if you please." And again: "O Lord! was there ever such a pack of

unjust and unrighteous Judges in the world ! Sir, in plain English let me tell you, if I thought you would have bound me up to a single plea, and not have given me in my Plea the just latitude of the Law, Equity and Reason, but hold me thus close to your single Formalities, contrary to your promises, I would rather have dyed in this very Court before I would have pleaded one word unto you" (*Ibid.*, p. 30).

\* \* \* \* \*

"*Lord Keeble* : This is not the Rational way you said you would go in."

"*Lieut.-Col. Lilb.* : Sir, my life is before you, you may murther me and take away my Blood if you please."

"*Lord Keeble* : I will not be outvoiced by you, our lives and our souls are upon it, therefore you shall have Equity and Justice, yea, such as you desire yourself" (*Ibid.*, p. 31).

These are fair samples of the way in which the trial was conducted on both sides ; but this is beside our present purpose. Eventually, in spite of his fears that by so doing he would be entrapped or ensnared into admitting the legality of the Court or its jurisdiction to try him, he was induced to plead, and pleaded "Not Guilty," though not quite in the usual way. "I am not Guilty of any of the Treasons in manner and form as they are there laid down in that Indictment (*pointing to it*) and therefore now Sir, having Pleaded, I crave the liberty of England, that you will assign me Counsel." (*Lilburn's Tryal*, pp. 24 and 25.)

### THE PETTY JURY.

It was not, however, till the third day that the Petty Jury was empanelled and sworn and the trial really began. The names of the Jurors sworn were :—

- |                     |                     |
|---------------------|---------------------|
| 1. Miles Petty.     | 7. Edward Perkins.  |
| 2. Stephen Isles.   | 8. Ralph Packham.   |
| 3. John King.       | 9. William Commins. |
| 4. Nicholas Murren. | 10. Simon Weedon.   |
| 5. Thomas Dainty.   | 11. Henry Tooley.   |
| 6. Edmund Keyzer.   | 12. Abraham Smith.  |

Of these, six were said to live "about Smithfield," one in "Gosling Street," two "in Cheapside," two "in Bread St.," "and one in Friday Street." That the jury was an impartial one may be gathered from the fact that several jurors were challenged or "excepted against" both by the prosecution and the prisoner, who declared "I do not know the faces of (any) two of the men that were read over to me"; and as to Simon Weedon he said, "He is an honest man and looks with an honest face, let him go." Throughout the trial the Petty Jury is described as "The Jury of Life and Death."

In *Lilburn Tried & Cast* (p. 8) the author of that peculiar production explains what he calls "Lilburn's slight trick; how he escapes at his Tryalls" in the following words: "It is a mysterie and a Riddle to many, how Mr. Lilburn, Arraigned for Treason, appearing before so many Judges, Justices, Sergeants at Law, &c., the charge brought in against him being of such high concernment, and so clearly proved, should notwithstanding (for all this) be quitted and not found guilty. Is not this *mirum* if not *miraculum*, a wonder—a wonderful wonder? But stay; it is a very slight Tricke, and easie to be done, if known. As how? Why thus it is. Before he comes to Tryall, he gets the names of such men as are warned in to be of his Jurie, and out of these (suppose thirty or forty) he chooseth twelve, all known to him to be as ill-affected as himselfe to the present Government, and such as are resolv'd to cleare him in spite of Law, Justice, Judges, Prooffe, and Witnesses." As to this insinuation, it may be said that there is no proof whatever

of it. It rests on the bare assertion of the author of the book (John Canne?). Not only did Lilburn make the statement above quoted at the time the jurors were sworn, but he repeated it in his speech to the jury: "To my knowledge I never saw the faces of any two of them before this day" (*Lilburn's Tryal*, p. 116): and it would have been easy to have contradicted him. Moreover, we may rest assured that Cromwell and his myrmidons would take good care to prevent anything of the sort. The probabilities are all the other way, as it was not till 1695 that prisoners charged with treason were allowed to see the pannel of the jurors by whom they were to be tried. Lord Clarendon, indeed, says that "all care" was "taken for the return of such a jury as might be fit for the importance of the case" (*Hist. Rebellion*, Bk. XIV, p. 645).

#### THE COUNSEL.

The case for the prosecution was conducted by Mr. Prideaux,<sup>1</sup> the Attorney-General, as Senior Counsel. His Junior is described as "Mr. ———, the Counsel that was an Assistant to Mr. Prideaux." It is unfortunate that his name is not known, since the personal element constitutes one of the chief charms of the State Trials. Whether he desired his name to be suppressed, or whether it was omitted by accident, it is impossible to say. He performed his part of an unpleasant duty in a way that requires no comment. Lilburn, as we have seen, defended himself. Persons charged with felony and treason had not at that time the right to be defended by Counsel. This was one of his great grievances, and there can be little doubt that his

<sup>1</sup> PRIDEAUX, EDMOND, afterwards Sir Edmond, Baronet; a Chancery barrister, more eminent for his skilful management of the Post Office than for his powers of advocacy. (Foss; *Biographia Juridica*, p. 539; *Dict. Nat. Biog.*, XLVI, p. 351.) Blackstone (*Comm.*, Bk. i, c. 8, sect. 4) says his reforms in the postal service saved the country £7,000 a year. He was no match for Lilburne as an advocate. See Lilburne's Trial in 1653.

advocacy of this right ("That which I conceive to be my Birth Right and Privilege, to consult with Counsel") did much to bring about a reform of the law in this respect. In 1695 it was enacted by 7 Will. III, c. 3, that prisoners indicted for High Treason should have a copy of the indictment delivered to them five days at least before the trial, and a copy of the pannel of the jurors two days before the trial, and should be allowed the assistance of Counsel throughout the trial. Whatever we may think of Lilburn as a politician, it cannot be denied that he was one of our first and most far-seeing law reformers.

The constant burden of his complaint was: "I desire nothing but Counsel, and a little time to consult with them, and to produce my Witnesses, and a copy of my Indictment; if not, I am willing to die as the Object of your Indignation and Malice. Do your will and pleasure." (*Lilburn's Tryal*, p. 39.) This request was refused, although it had been granted a short time before in the case of *Major Rolfe*, who was charged with High Treason at Hampshire Assizes, before Lord Chief Baron Wilde, and who escaped through the ingenuity of the Counsel assigned to him, viz., Mr. Nichols (one of the Commissioners, "now a Judge of this Bench and sitting there") and Mr. Maynard. (See *Lilburn's Tryal*, pp. 45 and 46; *St. Tr.*, iv, 1315 and 1316). To these points, therefore, he returned over and over again. Within fifty years afterwards they were all conceded to prisoners upon trial for treason. He also made many appeals and references to the "Good Old Laws of England," and to "Fundamental Laws" which were then no doubt regarded as serious subjects, but which would now-a-days provoke a smile.

## TWO "ACTS OF PARLIAMENT."

Lilburn was indicted under the two Acts of Parliament above referred to, dated respectively the 14th May, 1649,

and the 17th July, 1649. The first of these Acts, which we give at some length as a curious and interesting historical document, in addition to its bearing on the subject of this paper, ran as follows:—

*An Act of the 14. of May, 1649.*

*Declaring what offences shall be adjudged Treason.*

WHEREAS the Parliament hath abolished the Kingly Office in England and Ireland and in the Dominions and Territories thereunto belonging; and having resolved and declared that the People shall for the Future be Governed by its own Representatives or National Meetings in Council chosen and intrusted by them for that purpose, hath settled that Government in the Way of a Commonwealth and free State without King or House of Lords. Be it therefore enacted by this present Parliament and by the Authority of the same that if any Person shall Maliciously or Advisedly Publish by Writing Printing or openly Declaring That the said Government is Tyrannical Usurped or Unlawful; Or that the Commons in Parliament assembled are not the Supream Authority of this Nation or shall Plot Contrive or Endeavour to Stir up or raise Force against the present Government or for the Subversion or Alteration of the same and shall declare the same by any open Deed; That then every such Offence shall be taken deemed and adjudged by the Authority of this present Parliament to be High Treason.

\* \* \* \* \*

Be it further Enacted by the Authority aforesaid that if any Person not being an Officer Soldier or Member of the Army shall Plot Contrive or Endeavour to stir up any Mutiny in the said Army or withdraw any Soldier or Officer from their Obedience to their Superior Officers or from the present Government as aforesaid or shall Procure Invite Aid or Assist any Foreigners or Strangers to Invade England or Ireland; or shall adhere to any Forces raised by the Enemies of the Parliament or Commonwealth or Keepers of the Liberties of England:

\* \* \* \* \*

That then every such Offence and Offences shall be taken deemed and declared by the Authority of this Parliament to be High Treason: And every such Person shall suffer Pain of Death and also Forfeit unto the Keepers of the Liberty of England to and for the Use of the Commonwealth all and singular his and their Lands Tenements and Hereditaments Goods and Chattels as in Case of High Treason. (See *Lilburn's Tryal*, pp. 76 and 77.)

This Act is also set out in *Lilburn Tried and Cast*, in large type, and in black letter.

The second of these Acts was a mere re-enactment of the first, word for word, so far as the first went, but it also made certain offences against the coinage treason.

## THE INDICTMENT.

This was a very long, wordy document, as indictments were in those days. It set out at great length that "John Lilburn late of London, Gentleman, as a false Traytor, not having the Fear of God before his Eyes, but being stirred and moved up by the Instigation of the Devil, did endeavour not only to disturb the Peace and Tranquility of this Nation but also the Government thereof to subvert." We do not, however, propose to give it at length. The main points of it were very well summarized by "Mr. Attorney," in his address to the Court, after his junior had shortly opened the case for the prosecution, in the following terms:—

*"Mr. Attorney:* My Lord, and you Gentlemen of the Jury, you have heard the Indictment read unto you, and you have heard it opened unto you, and you have heard what Mr. Lilburn says, that he did not plead Not Guilty, and I hope he is ashamed of his Plea, now he hears the Indictment opened unto him. My Lord, in this Indictment there is contained these several Grand Treasons."

"The first is, that he hath Advisedly, Trayterously, and Maliciously published, that the Government that is now established by way of a free State or Common-wealth, without either King or House of Lords, is Tyrannical, Usurped and Unlawful; and further, that the present Parliament now assembled, are not the Supream Authority of the Nation."

"The second is this, that he hath Plotted, Contrived and Endeavoured to stir up and raise Forces against the present Government and for the Subversion and Alteration of the same."

"The third is this, and relates to the Army, you have heard what his Expressions have been, and they have been read unto you, concerning them and the rest, that he, not

being an Officer, or Soldier, or Member of the present Army, hath offered to stir up Mutiny in the Army, and to withdraw the Soldiers from their Obedience and Subjection to their Superior Officer, and thereby to stir them up to Mutiny and Discontent."

"These are the main parts and substance of what I intend to Charge him with in the Evidence, to prove that which was contained in the Indictment."

The Indictment, which was read at length by Mr. Broughton, the Clerk of the Court, contained long extracts from Lilburn's writings in support of each of these allegations, which it is impossible to reproduce here, however interesting in themselves. They bear out as fully as any writings could do the charges made against him. In these passages Lilburn described the so-called Parliament as "the present Tyrannical and Arbitrary, new Erected and Robbing Government." He said that "the present Juncto sitting at Westminster are no Parliament at all in any Sense, either upon the Principles of Law or Reason, but are a Company of usurping Tyrants and Destroyers of our Laws, Liberties, Freedom and Properties; sitting by virtue of the Power and Conquest of the Sword." In another place he said it was "no other than a Mock Parliament, a Shadow of a Parliament, a seeming Authority." He accused the officers of the Army "our Lords and Riders" of having erected "a Martial Government by Blood and Violence," and of having "impulsed" it "upon us." Again he speaks of "the present Generation of swaying Men that under pretence of Good, Kindness and Friendship, have destroyed and trod under foot all the Liberties of this Nation, and will not let us have a New Parliament, but set up by the Sword their own Insufferable, Insupportable, Tyrannical Tyranny." He asserted that "the intruding General Fairfax and his Forces had broke and annihilated all the Formal and Legal Magistracy of England, yea the



very Parliament itself ; and by his Will and Sword (absolute Conqueror like) had most Tyrannically Erected and Set up, and imposed on the free People of this Nation a Juncto or Mock Power, sitting at Westminster ; whom he and his Associates called a Parliament ; who, like so many Armed Thieves and Robbers upon the Highway, assumed a power by their own Wills, most Traytorously to do what they like." He accused Oliver Cromwell "for a wilful murderer, and desire you there to acquaint your house therewith." Speaking of Cromwell's acts, he says: "the like of which Tyranny the King never did in his reign, yet by S. Oliver's means lost his head for a Tyrant ; but the thing that I principally drive at here is to declare that Oliver and his Parliament now at Westminster (for the Nation's it is not) have pluckt up the House of Lords by the Roots." Finally, he says that the members of the so-called Parliament and their supporters ought to be exterminated "as so many Weasels or Pole-cats." These short extracts will suffice to show the general character of his writings ; we have seen what effect they had upon the Army.

Prof. Gardiner observes that in the Indictment: "there was no mention of the publication on account of which Lilburn had been committed to the Tower in March, the charge of Treason being made to rest on his more recent pamphlets." (*Hist. Commonwealth*, Vol. I, p. 185.) This is not quite correct. The *Agreement of the People* was published on May 1st, and the Act under which he was indicted was not passed until May 14th. The prosecution, however, urged that the pamphlet was in circulation after that date. It was, therefore, a sort of continuing offence.

### THE EVIDENCE.

It is unnecessary for us to go through the evidence which was given to prove the writing, printing, and publication of the pamphlets, etc., above mentioned. It is sufficient to say

that such evidence was conclusive, if not overwhelming. As to one of the incriminating documents (*A Salva Libertate*), the Lieutenant of the Tower swore that Lilburn gave him "the true original" with his own hand, and added, "It was never out of my Custody since he gave it me." One's respect for Lilburn would be greater if he had boldly acknowledged that he was the author and publisher of them. All England knew that he was, and he himself, when out of custody, gloried in the fact. In denying the authorship and publication he was compelled to do that which, to plain men, appears to be and can only be described as a downright lie. Yet one must not forget that he was on trial for his life, surrounded by implacable enemies, thirsting for his blood, determined to show him no mercy, and hesitating at nothing to accomplish their ends, and therefore a good deal of indulgence ought to be extended to him. In such circumstances a man can scarcely be blamed for taking advantage of every technicality and insisting on the strictest legal proof. Lilburn called no witnesses on his behalf. His defence, as we shall see, was a purely legal one.

#### THE CLIMAX: A HISTORIC "SCENE."

We have now arrived at the climax of the trial, having regard to the object we have in view in these papers. No such conflict of opinion or of language, so far as we are aware, has ever taken place in an English Court of Justice, and we believe the scene is without a parallel in the annals of jurisprudence. Never before or since has a layman disputed with the judges themselves about the very foundations of their jurisdiction.

Towards the end of the trial, which lasted ten hours on the third day, Lilburn became, as he well might, very fatigued, and said: "I have been a great while yesterday pleading my Right by Law for Counsel, and now I have stood many Hours to hear your Proofs to the Indictment.

I hope you will not be so cruel, to put me to a present answer, when my bodily strength is spent." The Judges, however, compelled him to proceed, and he began his address with these words: "Well then, if it must be that you will have my Blood, Right or Wrong, and if I shall not have one Hour's time to refresh me, after my strength is spent, and to consider that which has been alleged against me, then I appeal (which he uttered with a Mighty Voice) to the Righteous God of Heaven and Earth against you, where I am sure I shall be heard and find access, and may the Lord God Omnipotent Judge betwixt you and me and require and requite my Blood upon the Heads of you and your Posterity to the third and fourth Generation."

His chair having been taken away so as to compel him to stand up and speak, he went on :

"Well, seeing I must do it, the will of God be done ;" but his brother, being next to him was heard to press him to pause a little more. "No, Brother," saith he, "my work is done. I will warrant you by the Strength of God, I will knock the Naylor upon the Head ;" and so he went to the Bar and set the Chair before him, and laid his Law Books open upon it, in order as he intended to use them, and being ready, said :

"Sir, I humbly crave the favour since it is my hard Lot and Fortune, at least in my own apprehension, to have so much hard Measure and Injustice as I have, to know whether or no you will permit me, after that I have pleaded to a Matter of Fact, according to the Law of England, that has been allowed to the Highest Traytors in all the Books that I have read of, that I may speak in my own behalf unto *the Jury, my Country-men*, upon whose Consciences, Integrity and Honesty, my Life and the Lives and Liberties of the Honest men of this Nation now lie, *who are in Law Judges of Law as well as of Fact, and you only the pronouncers of their Sentence, Will and Mind*, I say, I desire to know when

I have pleaded to Matter of Fact, whether you will be pleased to give me leave to speak to them a few words besides." (*Lilburn's Tryal*, p. 106, *St. Tr.*, iv, 1379).

"*Lord Keeble* : Mr. Lilburn, quietly express yourself, and you do well; *the Jury are Judges of Matter of Fact altogether, and Judge Cook* (Sir Edward Coke) *says so, but I tell you the Opinion of the Court, they are not Judges of Matter of Law.*" (*Ib.*, p. 107).

"*Lilburn* : *The Jury by Law are not only Judges of Fact, but of Law also, and you that call yourselves Judges of the Law, are no more but Norman Intruders; and indeed and in Truth if the Jury please are no more but Cyphers, to pronounce their Verdict.*"

*Judge Jermyn* : Was there ever such a damnable blasphemous Heresie as this is, to call the Judges of the Law Cyphers"?

"*Lilburn* :<sup>1</sup> Sir, I entreat you give me leave to read the words of the Law then, *for to the Jury I apply, as my Judges both in the Law and Fact.*"

"*Lord Keeble* : We will not deny a Title (tittle) of the Law."

"*Judge Jermyn* : Let all the hearers know, the Jury ought to take Notice of it. That the *Judges that are Sworn*, that are Twelve in number, *they have ever been the Judges of the Law* from the first time that ever we can read or hear that Law was truly exprest in England, *and the Jury are only Judges, whether such a thing were done or no, they are only Judges of Matter of Fact.*"

"*Lilburn* : I deny it, here's your own Law to disprove you, and therefore let not me but read it; it is a hard Case when a man is upon the Tryal of his Life, that you will not suffer him to read the Law to the Jury, for his own Defence; I am sure you have caused to be read at large those Laws that make against me."

<sup>1</sup> In *Lilburne's Tryal* this is given as part of Judge Jermyn's speech; but it is obviously a mistake, and it is given as Lilburn's in *St. Tr.*, IV, 1380.

Holding in his hand the book, Lilburn endeavoured to read to the jury what he conceived to be the law, saying—  
 “Here is the first part of Cook’s Institutes, it is owned by all the Lawyers that I know, or ever heard of in England, for good Law.”

“*Lord Keeble* : If you can convince us, that Matter of Law does concern the Jury, you say something.”

“*Lilburn* : Sir, I have been shuffled too much out of my Liberties already, give me leave to read but the Law to the Jury, I will make use of nothing now to them but your own words, and when I have done, I will leave myself to them and the guidance of God upon their Conscience ; ” and having the book open in his hand, he said, “In the first part of Cook’s Institutes, Sect. 366, fols. 226, 227, 228, in his Exposition of Ployden (Plowden), hath these Words.”

Here he obviously made a slip of the tongue and Lord Keeble was down upon him at once, saying :—“I thought how good a Lawer you were . . . Go to your Matter of Fact, which is clear, but for this let it fall down, and spare yourself, and trouble yourself no more with Cook, he has no Commentary upon Ployden.”

“But Mr. Lilburn prest to speak.”

“*Judge Fermyn* : Hold, Sir.”

“*Lilburn* : What, will you not allow me Liberty to read your Law ? O Unrighteous and Bloody Judges ! ”

“*Judge Fermyn* : By the Fancy of your own Mind you would puzzle the Jury, we know the Book a little better than you do, there is no such Book as Cook’s Commentary upon Ployden.” (*Ib.*, p. 108.)

“*Lord Keeble* ; Sir, you shall not read it.”

“*Judge Fermyn* : You cannot be suffered to read the Law, you have broached an erroneous opinion, *that the Jury are Judges of the Law*, which is enough to destroy all the Law in the Land ; there was never such a damnable Heresie broached in this Nation before.”

The Cryer here cried out, "Hear the Court."

"*Lilburn* : Do your Pleasure, then here I'll dye; *Jury take Notice of their Injustice : but seeing they will not hear me, I appeal to you*, and say, It is an easy Matter for an abler Man than I am, in so many Interruptions as I meet with, to mistake *Ployden* for *Littleton*, I am sure here is Cook's Commentaries upon *Littleton*, and these be his Words, 'In this Case the Recognitors of the Assize may say and render to the Justices their Verdict at large upon the whole Matter,' which I am sure is good Law, for as much as we see it continually done in all Actions of Trespass or assault, where the Jury doth not only Judge of the Validity of the Proof of the Fact, but also of the Law, by assigning what damages they think is just."

"*Lord Keeble* : I am sure you are in an Error, in as gross one as possible a Man can be in, this is so gross, that I thought it could not have come from Mr. *Lilburn*, that professeth himself to be a rational and knowing Man." Ignoring this remark of the presiding judge, *Lilburn* continued his address to the jury.

"*Lilburn* : And in another Place, he said : 'For as well as the Jurors may have Cognizance of the Lease, they also as well may have Cognizance of the Condition.' And further there Cook saith, 'Here it is to be observed that a *Special Verdict*, or at large, may be given in any Action, and upon any Issue, by the Issue General or Special.' And in Section 368, *Littleton* hath these Words, 'Also in such Case, where the Inquest may give their Verdict at large, if they will take upon them the knowledge of the Law, upon the Matter they may give their Verdict generally.' Cook's words upon it are fully to the same Purpose, who saith, 'Although the Jury, if they will take upon them (as *Littleton* here saith) the Knowledge of the Law, may give a *General Verdict*.' I am sure this is pertinent to my Purpose, and now I have done, Sir." (*Ib.*, p. 108; *St. Tr.*, IV, 1381.)

In *Lilburn's Tryal* the reporter or editor (*Theodorus Verax*) points out in a footnote, on p. 15, that the Attorney-General (Mr. Prideaux) in his opening speech to the Jury had fallen into the same error. The Attorney-General's words were: "My Lord, he (Lilburn) is now come to his Tryal, not in an extraordinary way, but by a Jury of good and legal Men of the Neighbourhood, *by Men that do know, my Lord, and understand what is Fact, what is Law, and to do Justice indifferently between both.*" The editor's comment is as follows:—"Mark that well, for Judge Jermyn called it a damnable Doctrine, when Mr. Lilburn declared the Jury were Judges of Law as well as of Fact."

It is, however, submitted that the language of the Attorney-General, though somewhat vague and loose, does not bear this interpretation, but rather indicates that the jury knew the distinction between their position as judges of fact and the position of the judges as judges of law. If it does bear the interpretation put upon it by the reporter or editor, it may be regarded simply as an unconscious reflection of a popular but mistaken historical view which was prevalent in that age, an age in which men "made history," if they did not study it scientifically.

\* \* \* \* \*

Throughout the whole of this stormy scene, it will be observed, the judges who took part in it resolutely maintained their position, *viz.*, that they, and they alone, were the judges of matter of law, and in so doing they were supported by the tacit approval of all the other judges. There was no wavering on the part of any of them, no dissentient opinion.

#### LILBURN'S ADDRESS TO THE JURY.

After the heated discussion given above, Lilburn proceeded to deal with the evidence: "I shall proccede on to answer your Proof to the Indictment, and that in the same Method

that your Witnesses swore." Having done so at considerable length, he said :—

"I have no more to say to all the Evidences, that have been read in Books against me, I leave it to the Consciences of my *Jury*, believing them to be a Generation of Men, that believe in God the Father, and believe they shall have a Portion in the Resurrection of the Dead, and stand before the Tribunal of the Lord Almighty, to give an account unto him the Lord of Life and Glory, and the Judge of all the Earth, of all their Actions done in the Flesh ; I leave it to their Judgments and Consciences to judge Righteously, between me and my Adversaries ; and the Lord of Life and Glory, to judge Right between me and you, that in all those things in your long Scroll<sup>1</sup> you pretend me Guilty of ; I hope I have so clearly and fully answered all and every, of your Proofs, that not any one thing sticks ; and to their Consciences I cast it ; hoping that they do look upon themselves, as standing in the presence of him that sees their Hearts, and knows now whether there be any Malice in them towards me or no, which for my part I do not believe there is, for I profess I know no wrong I have particularly done them as Men, or generally as *English-men* ; my Conscience is free and clear as in the sight of God, and hope, of all unbiassed Men ; and to my knowledge I never saw the Faces of any two of them before this Day, and therefore intirely as an *English-man* that Loves and Honours the good Old Laws of *England*, and earnestly Desires and Endeavours, and Struggles for the Preservation of Justice, and Just Magistracy, which I wish with all my Soul may be preserved ; and therefore having suffered much for the Preservation of the Common and Just Liberties of *England*, to their Consciences, and to their Judgments, I leave both this Matter, and the constant Series of all my Actions in this my Pilgrimage, and Veil of Tears here below." (*Lilburn's Tryal*, p. 116 ; *St. Tr.*, iv, 1389.)

<sup>1</sup> *I.e.*, the indictment.



Here he was about to conclude, but Lord Keeble indignantly said "Mr. Lilburn!"

"*Lilburn* : Your pleasure, Sir?"

"*Lord Keeble* : Nothing, Sir, but this, our Consciences are before God as well as yours, and therefore you need not speak thus."

Stung by this, Lilburn went on again. His peroration was as follows:—

"I have almost done, Sir, only once again, I claim that as my Right which you have promised, that I should have Counsel to Matter of Law; and if you give but your own Promise, which is my undoubted Right by your own Law, I fear not my Life: but if you again shall deny both these Legal Privileges, I shall desire my Jury to Take Notice, that I aver, you rob me of the Benefit of the Law and go about to Murther me, without and against Law; and therefore as a free-born English-man, and as a true Christian, that now stands in the Sight and Presence of God, with an upright Heart and Conscience, and with a cheerful countenance, (I) *cast my Life and the Lives of all the Honest Free-men of England, into the Hands of God, and his Gracious Protection, and into the Care and Conscience of my honest Jury and Fellow-Citizens, who I again declare by the Law of England, are the Conservators and sole Judges of my Life, having inherent in them alone, the Judicial Power of the Law as well as Fact; you Judges that sit there, being no more, if they please, but Cyphers to pronounce the Sentence, or their Clerks to say Amen, to them, being at the best, in your Original, but the Norman Conqueror's Intruders; and therefore, you Gentle-men of the Jury, my sole Judges, the Keepers of my Life, at whose hands, the Lord will require my Blood, in case you leave any part of my Indictment to the Cruel and Bloody Men: And therefore I desire you to know your Power, and consider your Duty, both to God and to Me, to your own Selves, and to your Country; and the Gracious Assisting*

Spirit, and Presence of the Lord God Omnipotent, the Governor of Heaven and Earth, and all Things therein contained, go along with you, give Counsel and direct you, to do that which is just and for his Glory." (*Lilburn's Tryal*, pp. 121-2; *St. Tr.*, iv, 1395.)

\* \* \* \* \*

The report then states: "The People with a loud Voice Cryed Amen, Amen, and gave an extraordinary great Hum, which made the Judges look somewhat untowardly about them, and caused Major General Skippon to send for three more Fresh Companies of Foot Soldiers."

#### THE ATTORNEY-GENERAL'S ADDRESS.

In the course of his address to the Jury the Attorney-General said:—"Mr. Lilburn hath been very free in his Writing, in his Speaking, in his Printing, and it now rises in Judgment against him, and the Law must now give him his due, *which you, my Lords, are sole Judges of, and from whom the Jury and the Prisoner both must receive for all that which Mr. Lilburn hath said to the contrary. And the Jury Answers to the Matter of Fact*, and they are upon their Oaths Sworn to do the things that are just and right." (*Lilburn's Tryal*, p. 128.)

#### THE SUMMING UP.

In his summing up Lord Keeble told the Jury, "*You are the proper Judges of the matter of fact, being of the country.*"

Mr. Justice Ferymyn added: "Gentlemen of the Jury, I did Expect it; it was Expected by the Court, that some Matter of Law, or some Question at Law might arise upon the Evidence, which if it had, it was the Duty of the Court to have cleared it, but there does not appear, and therefore there is an end, as to the Dispute of the Law."

The Foreman of the Jury said:—"We are no Lawyers indeed, my Lord."

Lilburn thought it necessary to say: "I desire your favour that there may be a course taken that neither my Prosecutors nor any belonging to them, may have Access unto the Jury, till they have done."

#### THE VERDICT.

The Fore-man desired "the Act for Treason," and one of the Jury "desired to drink a Cup of Sack, for they had sat long, and how much longer the Debate of the Business might last he knew not." The latter request was refused, the Judges saying that in ordinary cases juries had been permitted to drink before they went from the Bar, but not in cases of Felony or Treason. "And therefore withdraw about your work."

The Jury retired about five o'clock, after having sat ten hours, and the Court adjourned till six o'clock. The Jury came into Court again, after an absence of three-quarters of an hour; the prisoner was sent for; silence was proclaimed and the names of the Jurors were called.

"*Clerk* : Are you agreed of your Verdict ? "

"*Jury* : Yes."

"*Clerk* : Who shall speak for you ? "

"*Jury* : Our Fore-man."

"*Cryer* : John Lilburn, hold up thy Hand. What say you (*look upon the Prisoner*), is he Guilty of the Treasons charged upon him or any of them ? "

"*Fore-man* : Not Guilty of all of them."

"*Clerk* : Nor of all the Treasons, or any of them that are layed to his charge."

"*Fore-man* : No, of all, nor of any one of them."

"*Clerk* : Did he fly for the same ? "

"*Fore-man* : No."

"Which 'No' being pronounced with a loud voice, immediately the whole multitude of People in the Hall, for Joy of the Prisoner's acquittal gave such a loud and unanimous

Shout, as is believed was never heard in Guild Hall, which lasted for about half an Hour without intermission: which made the Judges for Fear, Turn-pale and hang down their Heads; but the Prisoner stood silent at the Bar, rather more sad in his countenance than he was before." (*Lilburn's Tryal*, p. 131.)

Notwithstanding his acquittal by the petty jury Lilburn was again committed to the Tower, and the Court adjourned till the Wednesday following.

"And extraordinary were the Acclamations for the Prisoner's Deliverance, as the like hath not been seen in England, which Acclamations, and loud rejoicing Expressions, went quite through the Streets, with him to the very gates of the Tower, and for Joy the People caused that Night abundance of Bonfires to be made all up and down the Streets; and yet for all his acquittal by the Law, his Adversaries kept him afterwards so long in Prison, that the People wondered and began to grumble, that he was not Discharged, and divers of his Friends went to the Judges, the Parliament, and Council of State, by whose Importunities, by the seasonable help of Lord Grey of Groby, Colonel Ludlow, Mr. Robinson and Colonel Martin his Discharge was procured." (*Lilburn's Tryal*, p. 131.)

Professor Gardiner also gives a remarkably graphic description of the popular applause which followed his acquittal, drawn largely from this source, beginning "Then ensued a scene, the like of which had in all probability never been witnessed in an English Court of justice, and was never again to be witnessed till the seven bishops were freed by the verdict of the jury from the rage of James II." (*Hist. Commonwealth*, Vol. I, p. 188.)

Lilburn was set at liberty on the 8th November, 1649, and on the same day his companions in misfortune, Walwyn, Prince and Overton, were also released.

No proceedings were taken against the petty jury. In

the state of public feeling which prevailed, Cromwell and his Council of State were far too wise to take any such step, whatever their private feelings upon the matter may have been. According to Lord Clarendon, Cromwell was "infinitely enraged and perplexed" by Lilburne's acquittal, so much so that he "looked upon it as a greater defeat than the loss of a battle would have been." (*Hist. of the Rebellion* [1826 ed.], Bk. XIV, p. 646.)

\* \* \* \* \*

Professor Gardiner, looking at the matter from the point of view of a historian, says that "Lilburn's defence is to those who look for an argument going to the root of the questions in dispute in the highest degree disappointing. There is much urging of legal technicalities, much questioning whether the books which everyone knew had issued from his pen had legally been proved to be his own, and a flattering call to the jury to remember that they were judges of law as well of fact, and that the judges on the bench were no more than Norman intruders, and in truth as soon as the jury pleased to pronounce their verdict, no more than cyphers." (*Hist. Commonwealth*, Vol. I, p. 186).

He then goes on to consider *what was the real point before the jury* :—"Impossible as it is to pry into the hearts of the jury, it is hardly likely that, when at five in the afternoon, after having sat for ten hours, they began to consider their verdict, they were much moved by any of these things. The broad issues had been revealed, if not in Lilburn's speech in defence, in the copious extracts from his writings which had been read aloud by the clerk at the instigation of the Attorney-General. Was England to be governed in accordance with the will of its freely elected representatives, or by a little knot of men who owed what authority they possessed to the sword of a victorious army? The decision was the easier because the jury had not come to a resolution on a question of abstract politics. They had simply to

determine whether they would hang the prisoner for expressing his disapproval of acts which had so dubious an origin." (*Hist. Commonwealth*, Vol. I, pp. 186-7.)

As to the verdict, the same eminent authority observes: "Rhetorically exaggerated as the words were, Lilburn's diagnosis of the situation was sufficiently near to the mark to win sympathy from the tradesmen who composed the jury, and who detested nothing so much as the military compulsion which bore them down." (*Hist. Commonwealth*, Vol. I, p. 188.)

It is perhaps the privilege of a historian to take a somewhat wider view of public events than a lawyer is able to take; and it is no doubt much easier to make broad generalizations long after events have taken place, when all trace of party spirit has disappeared. But in the opinion of Lilburn's contemporaries, the true reason of Lilburn's acquittal undoubtedly was that the jury, at his flattering suggestion, believed themselves to be judges of law as well as of fact, and decided accordingly. If there was any doubt on this point, it was set at rest by the examination of the jury which tried him in 1653, which we shall have to consider hereafter; and Mr. Justice Stephen is very emphatic on this point. He says:—"This, no doubt, was the point which secured his acquittal." (*Hist. Crim. Law*, Vol. I, p. 367.) Lilburn's main argument bears a striking resemblance to that of King Charles I at his trial. It was this. The ancient constitution of this Kingdom consisted of three elements or factors, viz.:—(1) King or Queen; (2) House of Peers; (3) House of Commons. Without the concurrence and assent of any one of these three factors no valid law could be made, and no act of government legitimately performed. Lilburn's contention was that there was no longer a "Legal Magistracy" in England; that "all the Legal and Visible Magistracy and Authority in the Nation" had been conquered, repelled, subdued and "Pulled up by

the Roots.”<sup>1</sup> In both King Charles’ case and Lilburn’s two of these factors were absent, viz., the King and the House of Peers. Hence the Commissions appointed to try them were, in each case, from this point of view, illegal. In the King’s case, however, there was no jury. The Commissioners who sat to try him were both judges and jury, and therefore they themselves had to try the question of their own legality, and they decided it in favour of their own existence. In Lilburn’s case there was a jury, and this jury in effect decided against the legality of the Commission appointed to try him and of all its proceedings, as well as those of the so-called Parliament and Council of State.

On the other hand, it has been enacted by 11 Hen. VII, c. 1 (1495), (which Act merely declares the Common law) that no person should be convicted or attainted of treason for serving and paying allegiance to a king *de facto*, or, in other words, that only a king *de facto* is the object of treason and that a king *de jure* has no claim to allegiance. It follows as a necessary corollary to this that treason may be committed against the sovereign *de facto*. Cromwell and his supporters (or as Lilburn called them, “the present ruling men”) were undoubtedly, in the Austinian sense, the sovereign power *de facto*. The verdict of the jury in Lilburn’s case, therefore, goes to show that in the popular mind the basis of law is to be found in custom and morality as well as in physical force.

As regards procedure and evidence, which are inextricably bound up with the jury system, Lilburn’s case in 1649 marks a decided advance on Throckmorton’s. There is some approach to the order and method of a modern trial, though the modern standard has not yet been attained. Thus the evidence was given *viva voce*, “face to face” with the prisoner, and not by way of depositions, but the right of cross-examination had not yet been established, nor

<sup>1</sup> In the *Apprentices’ Outcry* (p. 2), he had said: “The King most illegally was put to death, by a strange, monstrous, illegal, arbitrary Court, such as England never knew.”

was the rule against leading questions fully understood and applied. The germ of these matters and some others, however, are to be found in Lilburn's trial, and may perhaps form a subject for fruitful discussion at some future time. Mr. Justice Stephen has pointed out that "from the year 1640 downwards, the whole spirit and temper of the Criminal Courts, even in their most irregular and revolutionary proceedings, appears to have been radically changed from what it had been in the preceding century to what it is in our own days." And he further says, "these great changes in the procedure took place apparently spontaneously, and without legislative enactment." (*Hist. Crim. Law*, Vol. I, p. 358.) We venture to think that no small part of this change was due to the ability and sagacity of John Lilburn as a Law Reformer, combined with the necessity of his situation, however extreme he may have been in some of his ideas, and however mistaken historically.

G. GLOVER ALEXANDER.

(*To be continued.*)

## V.—CRIMINAL RESPONSIBILITY.

A well-known writer on problems of pathology, Mr. Charles Mercier, M.B., has now produced a work<sup>1</sup> which is marked by the same logical grasp, analytical power, and cautious common sense that characterize all his writings. But I gather from the tone of his remarks that he has suffered from the sentimental reformer, and from those of his medical brethren whose zeal is more commendable than their discretion. As a consequence he is at such pains to show his complete freedom from literary hysteria, that he scarcely does justice to his reforming instincts. The guise of the conservative reactionary, however, is not altogether

<sup>1</sup> *Criminal Responsibility*, by CHARLES MERCIER, M.B. Oxford: Clarendon Press.



successful, and the reformer peeps out from time to time. Long has the feud been waged between the medical and legal professions on the subject of criminal responsibility. The lawyer for many years persisted in looking upon insanity as primarily a matter of intellectual aberration: the physician that of emotional aberration. Consequently whereas the one asked, "Did he know what he was doing?" the other queried, "Could he help doing what he did?" The lawyer failed to see that there may be cases of mental disease where a man may appreciate the nature of his act but be unable to control his actions. The physician would not recognise the fact that (the border line between sanity and insanity being so indefinite) the *mere* presence of morbid ideas must not exempt from *all* responsibility. He did not perceive that the lawyer has one aim—to secure uniformity of conduct—and that he would naturally scrutinize with jealous care any proposed exceptions to the recognised rules of responsibility.

To-day, however, when we are all physicians—to paraphrase a famous remark—and questions of medical science are threshed out so openly, the feud shows signs of coming to an end. And on the whole small exception can be taken to the attitude of the legal profession to-day. With fine British conservatism we still retain the legal criterion of the days of unenlightenment, but we construe it with generous inconsistency in the light of modern sentiment, so there is little to complain of the spirit in which the Courts approach the question of insanity to-day.

Mr. Mercier, indeed, seems almost afraid that his medical brother is having it too much his own way, and he makes at times as if to annihilate the reformer. But as Lamb said acent Coleridge's metaphysics, "It is only his fun." Wheeling his tomahawk fiercely in the air round his opponent's head, as if he would break it in, Mr. Mercier ends often by bringing down the formidable instrument quite

gently and with almost a caress on the threatened cranium. So that even radicals like Dr. Maudsley have little to fear from Mr. Mercier, for he frowns on them in a peroration, then practically exonerates them in a parenthesis.

I propose in this paper to consider a few of the points raised by Mr. Mercier where I am unable to follow him, *i. e.*, his reactionary moods. In his opening chapter, where he deals with punishment as it is, or ought to be, he maintains that punishment should be "primarily retributive, secondarily deterrent, and tertiarily, and in much lower degree, reformatory."

That in its early stages the idea of "an eye for an eye, and a tooth for a tooth" was the dominant sentiment, cannot be denied. But it is quite another thing to hold up this standard of vengeance as an ideal, and it seems rather strange that one who understands the insane neurosis, as Mr. Mercier does, and who is opposed to withdrawing punishment from the insane, should give it so marked a prominence. Mr. Mercier may be quite right in contending that the doctrine "that an insane person should under any circumstances be punished, appears both unjust and impracticable." But punishment in this connection should, surely, have as little of the retributive element as possible. Let me quote Mr. Mercier's own cogent analysis of the insane mind, in support of my view. "It is quite exceptional for a person who suffers from delusions to reason logically from those delusions, as a person might from a sane belief. The delusion is not an isolated disorder. It is merely the superficial indication of a deep-seated and widespread disorder. As a small island is but the summit of an immense mountain rising from the floor of the sea, the portion of the mountain in sight bearing but an insignificant ratio to the mass whose summit it is, so a delusion is merely the conspicuous part of a mental disorder, extending, it may be, to the very foundations of the mind, but the greater portion of

which is not apparent without careful sounding. Precisely how far this disorder extends beyond the region of mind occupied by the delusion, it is never possible to say; but it is certain that the delusion itself is the least part of the disorder, and, for this reason, no deluded person ought ever to be regarded as fully responsible for any act he may do."

Now, however necessary some form of discipline may be in asylums; however helpful punishment of a kind may be in regulating the conduct of the insane under certain conditions where those in authority are satisfied that some measure of responsibility exists; yet on Mr. Mercier's own showing these persons should never be regarded as fully responsible. A system of punishment, with retribution as its main factor, seems scarcely the kind of system one would mete out to such people. My own feeling is that in no case—whether dealing with sane or insane—should retribution be the primary inspiration; but it seems particularly ill-suited as applied to only the partially-responsible.

Kant, it is true, looked upon punishment as an act of retribution, something that should inflict upon the criminal a similar injury to that which he had inflicted on the victim. But can this ever be done? Can you punish a murderer by making him undergo the agony which his victim has undergone? Even assuming that the theory of deterrence be put on a level with the theory of retribution, the punishment still is quite unrelated to the benefits it may confer on the person punished. Is that after all so inconsiderable a matter as Mr. Mercier seems to suggest? Surely the punishment which acts as a discipline is the punishment which has the most to commend it. I do not say that retribution should have no part in punishment: nor do I suggest that the reformation of the criminal is the only thing to be considered. Some of the most serious crimes are those the least likely to recur, and the habitual offender is one like the drunkard, who is reformed with the greatest

of difficulty. But I would reverse the order of Mr. Mercier, giving the greatest prominence to reformation, and the least prominence to retribution. Deterrence, of course, must not be overlooked, though regarded as an *end* of punishment it is woefully unsatisfactory.

However, there is no need for me to pursue this point further. I merely express surprise that a writer, who has studied the psychology of the criminal, and who must be aware of the fearful way in which many men and women are handicapped mentally and morally, through heredity and vicious environment, should take such a view of the end of punishment. This is, surely, an excessive reaction against sentimental humanitarianism.

Upon Sir FitzJames Stephen's well-known proposals, Mr. Mercier has much to say which seems to me inconclusive. "No act is a crime," according to Stephen, "if the person who does it is at the time prevented either by defective mental power or by any disease affecting his mind—

- (a) From knowing the nature and quality of his act, or
- (b) From knowing that the act is wrong [or
- (c) From controlling his own conduct, unless the absence of the power of control has been produced by his own default].

The parts enclosed in brackets are doubtful."

Stephen, therefore clearly regarded loss of control over the will as important as the knowledge test. Mr. Mercier, speaking from his own experience of insane people, says, "In practice we do not meet with insane people in whom defect or disorder of will exists as an isolated defect or disorder, apart from defect or disorder of intelligence; and this being so, the lack of knowledge is as efficient a test, and a test much more convenient, more easily applicable, and more reliable than the lack of will."

Mr. Mercier arrives at the conclusion that "when people

yield to morbid desires and perpetrate criminal acts in pursuance of such desires," they should be held to some extent responsible for their criminal acts. "Experience shows that such acts can be and are controlled in very many cases, and that even when such morbid persons give way to their desires under some circumstances, they are often capable of controlling them in other circumstances."

Two points detach themselves for consideration from the able and closely-reasoned chapter from which I have quoted (Chap. VIII).

(1) The preference of Mr. Mercier for the "Knowledge" test, provided that the term "knowledge" is rightly interpreted and understood.

(2) His objection to the "Want of Control" test.

Now, as regards (1), Mr. Mercier admits readily—it would be strange indeed were he to support it—that, interpreted in its narrow sense, the knowledge test laid down in the famous answers of the judges in *Macnaughten's Case* is unsatisfactory. His purpose is, he avows, "not to state what the law is, but, having examined its foundations, to give an opinion as to what it ought to be." What would he have the word "know" signify? Roughly speaking, it seems that defect of reasoning power is the one important thing in Mr. Mercier's opinion; he quotes the case of a weak-minded individual who assaults an imagined persecutor, exasperated by delusion. This man, according to our Author, is incapable of reasoning logically, and, although he knew the act to be wrong, he could not realize how wrong it was. Mr. Mercier arrives finally at the conclusion that justice will be done if the test is satisfied that they (*i. e.*, the insane) did not know the nature and quality of the act, and that it was wrong; *provided* that this knowledge includes knowledge and appreciation of the circumstances in which the act was done; and *provided* also it is held in

mind that knowledge is a matter of degree, and that a person may know his act is wrong without knowing how wrong it is.

Now in the majority of cases a comprehensive interpretation such as this would act very well. But I do not think it would cover all cases or prevent possible misjustice.

In cases of delusional insanity—in all cases, in fact where the intellect was obviously impaired, no further question would present itself. But, says Mr. Mercier, "In practice we do not meet with insane people in whom defect or disorder of will exists as an isolated defect or disorder, apart from defect or disorder of intelligence." Then what about cases of violent "obsession," where the patient is dominated by some overpowering idea that gives no peace till expressed in action? Mr. Mercier frankly admits the existence of these cases, but explains that in such cases "it is very doubtful whether there really is disorder of will. Disorder of desire there unquestionably is, but the competence of the will to overcome the morbid desire and to refuse to act in conformity with the desire, is shown in the very numerous cases in which the sufferer seeks advice and submits to discipline and restraint; and in which, moreover, they experience the desire in circumstances favourable to its satisfaction and yet refuse to satisfy it."

(2) I cannot see the practical force of the distinction drawn between "disorder of will" and "disorder of desire."

Is not the will a faculty which enables a man to co-ordinate and regulate his desires. Desires resemble a team of horses, with the will as driver. But if one of those horses becomes excessively violent and endowed with more than ordinary strength, defy all the efforts of the driver, you would say that it was a case of the driver being overpowered by the violence of the horse; you would not speak of the driver failing to use the power he should have exerted to control the horse. And surely, the mere fact that for a

moment or so the man might retain his mastery, is no proof that the horse was not the stronger and would not ultimately prove the victor. The fact that a man may resist an insane impulse is no proof that he can continue to do so on all occasions. There is a stage in strychnia poisoning where the convulsive impulse, though strong, is resistible; but Mr. Mercier would not argue from this that the impulse would never get beyond the man's physical control.

The distinction then between "disorder of desire" and "disorder of will" seems to me of no practical value, for Mr. Mercier's purposes. In homicidal insanity, the patient is possessed with an impulse to kill somebody. He appreciates the horror of his position, and, as Mr. Mercier would remark truly enough, often seeks advice and submits to discipline, in short, does all he can do to avoid the terrible compulsion of his obsession. Pinel relates of such a case at Bicêtre: "In other respects he enjoyed the free exercise of his reason; even during fits he replied directly to questions put to him and showed no kind of incoherence in his ideas, no sign of delirium; he even felt deeply all the horror of his situation . . . the internal combat between a sane reason in opposition to sanguinary cruelty reduced him to the brink of despair." On one occasion he tried to injure a man "whose mildness and compassion he was continually praising."

Now, I am sure Mr. Mercier would not hold such a case to be responsible, and he would probably argue that such a man was not sane in his reason and did not properly appreciate the character of his act. It seems to me, however, that the knowledge test, even as construed by Mr. Mercier, will not fairly meet a case like this. Given the power of control test, the solution is easy. Call it disorder of desire if you like, but a disorder of desire that paralysing the will, expresses itself in convulsive action, looks to me like irresistible impulse. At any rate, the question it

should suggest is, surely, "Could the patient help himself?" *not* "Did he know what he was doing and appreciate how wrong it was?"

In *R. v. Haynes*,<sup>1</sup> Bramwell, B., after reading the answers in *Macnaughten's Case*, thus treated the question of irresistible impulse. "If an influence be so powerful as to be termed irresistible, so much the more reason is there why we should not withdraw any of the safeguards tending to counteract it." According to the learned judge these safeguards were—"the restraint of religion, of conscience, and of law." It were as sensible to speak of religion, conscience and law helping to check a man from restraining his movements in convulsions. Now, so long as the old knowledge test is the only legal criterion, it is open to any judge to deal with irresistible impulse in a like manner. Therefore, I am surprised that Mr. Mercier did not welcome the fair-minded and admirable suggestion of Sir FitzJames Stephen with reference to self-control. The liberal construction he places upon the word "know" seems, as I have pointed out, inadequate in certain cases; and as against his suggestion I would submit the following as a proposition as to how the law should stand.

No act is a crime if the person who does it is at the time prevented, either by defective mental power, or by any disease affecting his mind—

- (a) From foreseeing the natural and probable consequences of his act; or
- (b) From appreciating the legal significance of his act; or
- (c) From appreciating the moral quality of his act; or
- (d) From controlling his own conduct.

The term "appreciate" seems to me more comprehensive and definite than the term "know"; that is my reason for preferring it.

<sup>1</sup> ([1859], 1 F. & F. 666.)



As regards (d) it will be seen I am inclined to go further than Stephen. I do not see the precise value of his qualification to the power of control test, *i.e.*, "unless the power of control has been produced by his own default." In cases of alcoholic insanity, where the power of control had been vitiated by a course of intemperance, the test might be ruled out. Many judges indeed take this view (though Stephen himself did not do so), and hold the man responsible. But if the impulse be admitted as irresistible when the act was committed, it seems scarcely just to hold the actor responsible because at some earlier period he might have prevented matters coming to its present pass. And if you make an exception, as Stephen did in *R. v. Davies*, where are you going to draw the line. Surely it is much simpler to let (d) stand as it is.

Of course, if the word "know" be made to carry with it the broader, more generous meaning, attached to it by Mr. Mercier, Mr. Pitt Lewis and others, well and good. It would put the law on a more satisfactory basis. But after all, as Mr. Pitt Lewis frankly remarks,<sup>1</sup> "The reader must be distinctly and very plainly warned that the broad and benign construction which it has been sought to place upon the rules laid down in *Macnaughten's Case* has, as a whole, never yet received the support of any reported decision. Some judges, it is true, incline to the generous construction and, roughly speaking, it seems probable, as Mr. Mercier suggests, that there is no great injustice done in these days. But should the law be made to depend merely upon "psychological atmosphere" and the temperaments of judges? I cannot see why the law, as proposed by Stephen, should not be the law of the land, and if his proviso were withdrawn, modifying the want of control test, so much the better.

This brings me to the last consideration in Mr. Mercier's

<sup>1</sup> *The Insane and the Law.*

book. The concluding chapter in the book is devoted to Procedure and Practice, and a most valuable and suggestive chapter it is, embodying the experience of many years. He deals fully with the subject, from the moment of the insane criminal's arrest until he is serving his sentence in prison. The most interesting part is, perhaps, the Report of the Criminal Responsibility Committee of the Médico-Psychological Association, 1894-6. Mr. Mercier was the secretary of this committee, and he has been naturally impressed by its findings. As a result of investigation the committee "found that, as a matter of fact, there did not exist any such amount or degree of injustice to insane offenders as would warrant an application for an alteration in the law." They felt that it was hopeless to expect that any fruitful result could follow an agitation for a revision of the law, unless that agitation were founded upon the fact that the law does, in actual practice, lead to the improper conviction as ordinary criminals of insane offenders. And this fact they failed to establish. This seems to be the final goal of all committees and commissions. It is a strange thing, that in 1865 (Royal Commission with reference to the Law of Homicide), in 1874 (Select Committee Homicidal Law Amendment Bill), 1879 (Royal Commission), and in 1894-6, the result of these investigations and considerations amounted to—Let the law stand as it is.

And yet some of our best judges have commented strongly on the unsatisfactory nature of the law. The most valuable criticism has been that of Sir FitzJames Stephen; but apart from that there are the trenchant comments of Lord Coleridge (*Western Morning News*, Feb. 28, 1891), while Mr. Justice Hawkins (now Lord Brampton) commented in 1885 on the unsatisfactory condition of the law. Certainly, as Stephen said, "for the public it is very much better that the law should be distinct and certain, than that unsatisfactory law should be so broadly construed as to work out satisfactorily on the whole in practice."

I have urged before in the pages of this journal that the most satisfactory method of effecting an alteration is the sending of a test case up to the Court for the consideration of Crown Cases Reserved, in order that this Court may re-state the law in more comprehensible form. The suggestion is not original; but it is one of the several methods suggested by would-be reformers that seems to me the most practicable.

Mr. Mercier estimates that about ten per cent. of condemned murderers are reprieved, because there is a doubt as to their sanity. The evidence of their sanity failed to convince the jury, not because of any fault in the procedure, but because it was not sufficiently cogent. Now, there is no subject more confusing to the average man than the subject of insanity. Its proper understanding demands psychological knowledge of no mean order; it is full of subtleties and delicate distinctions. Is it surprising that an ordinary jury find it extremely hard, not so much in weighing the facts of the case, as in estimating and deciding between the conflicting medical evidence?

Mr. Mercier makes a suggestion on this point which seems a very admirable one. In a recent case tried in Boston, U.S.A., the prosecution and the defence combined to make an arrangement by which three experts were conjointly to examine and report upon the prisoner with reference to her responsibility. "Thus," says Dr. Stedman, one of the committee of three, "the question was practically submitted to a commission at law, which allowed the examiners free interchange of opinions and impartial sifting of all obtainable evidence on both sides. In fact, it resolved itself into a medical consultation on the diagnosis of a case of alleged disease." This (remarks Mr. Mercier) seems an eminently satisfactory way of determining this difficult question. The case is not withdrawn from the consideration of a Court of Justice, but it is tried in the

ordinary way ; the only difference from ordinary procedure being that the jury have not to estimate the relative value of conflicting opinions, but are guided to a direct conclusion by a unanimous medical report. Failing this—and it is open, as Mr. Mercier sees, to the objection that some people would disallow the statement that the prisoner was irresponsible, that being the very question that the jury have to determine—why should not the jury be presided over by a medical expert (who was neither a witness nor called on behalf of the defence) who should assist the jury in deciding on the evidence as to the prisoner's responsibility? One or other of these methods would certainly render the trial of insane people less open to hostile criticism. It would be preferable to have the question of criminal responsibility decided by the judge ; but if this is not feasible, the next best thing is to assist the jury as far as possible in coming to a just decision.

I have not been able to do justice in the above paper to many of the excellencies in Mr. Mercier's book. If on certain points I have felt compelled to differ from the Author, and these points of difference have figured more prominently in the foregoing remarks than the points of sympathy, that is scarcely avoidable in an article of this kind.

The general conclusion of Mr. Mercier's reasoning seems to be this. The law as to criminal responsibility is antiquated, and if construed in its strict narrow sense would make for injustice. But on the whole, justice is done because the judges interpret the rules in *Macnaughten's Case* so liberally, and juries are naturally sympathetic when the question of insanity is raised. It is best then to leave things as they are. With this conclusion I cannot agree. Juries, as Stephen very justly said, are apt to go by the apparent madness of the action. When an act looks mad they exonerate, where it looks rational they commit. This is too rough and ready a test. Amplify the legal criterion of

responsibility, and you put the issue on a much clearer and more comprehensible basis.

The plea of irresistible impulse should be regarded with the closest scrutiny: but to rule out lack of self-control, as Mr. Mercier desiderates, seems quite opposed to the trend of modern progressive thought.

ARTHUR RICKETT.

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## VI.—OUGHT THE COUNTY COURT TO BE MADE A BRANCH OF THE HIGH COURT?

FROM time immemorial England has possessed, in some shape or other, local tribunals for the recovery of small debts, but, except in a few special instances, the maximum jurisdiction within living memory was forty shillings. I say within living memory as there are an appreciable number of solicitors whose names appear in the current *Law List* (1906) who were admitted upwards of sixty years ago; indeed there is more than one solicitor in existence who was enrolled in the reign of William IV (1833), but this is by the wayside. Several practitioners, therefore, remember when for the first time the area of these small Debt Courts was enlarged to twenty pounds. Efforts had been made in the earlier part of the nineteenth century to extend the forty-shilling limit to ten pounds; but the Legislature stood firm, resolving to treat these petty Courts as strictly small debt tribunals.

No useful purpose would be served here by considering in detail what happened prior to 1846, though it may be noticed that jurisdiction had been conferred upon the so-called "Sheriff's Court" to assess mere figures in High Court claims not seriously defended, thus helping to lessen the huge lists of cases for trial which would otherwise have flooded the superior tribunal. But it is necessary to recall the fact that Lord Brougham himself, long before 1846,

promoted a measure having for its object the erection of "Local District Courts" for claims up to a hundred pounds, and although the scheme was not proceeded with, it is much to be regretted that somebody did not seize upon such an intelligible *title* when later movements were under consideration. The statute of 1846, called "An Act for the more easy recovery of small debts," with jurisdiction up to twenty pounds, swept away all the old local Courts, with the exceptions before mentioned. The new tribunal unhappily retained the name of "County Court," or rather it was thus re-christened—a doubtful appellation 60 years ago, and absolutely misleading at the present hour. Had the other title, "Local District Court," been selected, it is very likely that long ere this, when jurisdiction was being increased so that it ran side by side with the High Court, it would have been merged in a district branch of the latter.

It is well known that the £20 jurisdiction originally given to County Courts—soon afterwards increased to £50—was, in the first place, limited to cases of contract, and it was only later on that tort claims to a similar amount were added. Thus the Common law jurisdiction remained as regards the cardinal point till quite recently, when the £50 was increased to £100, cases of breach of promise of marriage, seduction, libel, slander, and malicious prosecution being always excluded, as they still are. But during the last thirty years and more, not only were jurisdictions added to the County Court in Equity, Probate and Admiralty, but other work was thrust upon it. Ultimately the whole bankruptcy system outside the metropolitan area, and every bit of the labour under the 1869 Imprisonment for Debt Act, not to speak of the Workmen's Compensation Act (a huge business in itself), were relegated to these "small debt tribunals," filling them to the brim. The general principle, in fact, has been to pitchfork all otherwise unprovided-for legal business into the County Court, greatly to the

detriment of its original purpose. This has been done regardless of the absence of needful increased machinery, and also without augmenting the judges' salaries—an anomaly in the face of their work having been doubled, not to say trebled, in certain districts. This matter of salary is outside my particular concern, but one can easily realise that the judges themselves are silently smarting. It is a delicate position for them personally to touch, but whether we amalgamate or go on as we are, it is to be hoped that justice in this direction will not be much longer deferred.

I now come to the crucial question, whether the County Court ought to be made a branch of the High Court. If not, we must consider what should be done with the existing system to make it work in new and improved grooves. It is just a quarter of a century since I first publicly raised this issue. I, then a comparatively young man, had here and there attended to a County Court case in the midst of a general practice. I happened to have a taste for advocacy, and thus volunteered when there was any real contest, to personally appear. In this way, for several years—perhaps half a dozen times annually—I had occasion, not only to read up the statutes and rules, but what is far more important, to see the working of the system with my own eyes, especially getting acquainted with the *personnel* of the Courts—even more useful than studying books. I, as is my wont, “rushed into print,” for both before and after 1881, I wrote innumerable letters to the *Times*, as well as the leading law papers, on County Court reforms. Thus I was both privately and publicly brought into contact, not only with Registrars and other officials of the Court, but with many of the judges, past and present, an acquaintance very helpful to grasp the requirements and shortcomings of the system.

It was at the Law Society's Brighton Congress, 1881, that I read a paper entitled “Fusion of the Superior and

Inferior Courts." I did not claim that my idea was absolutely new, for a dozen years previously the Judicature Commissioners threw out a suggestion of amalgamation, though their views had long since been buried, as is the common fate of such reports when no living member of the commission takes sufficient individual interest to keep the thing alive. I, however, urged that my *modus operandi* brought the suggestion into workable shape, and I will recur to my recommendations when dealing with their present-day feasibility. No formal resolution was come to on my paper, for at that period I had not only not achieved the honour of a seat on the Daïs, but the interest of the Solicitor branch, though awakened, had not become sufficiently acute even to seriously discuss the various arguments I put forward; indeed, until one of our later Presidents (Mr. Rawle) was good enough to publicly refer to my 1881 essay, its existence was well-nigh forgotten. Not that it bore no fruit, for it led to the appointment of a committee of members of which I became Secretary, followed some years later by a more extended committee (composed of outside practitioners, as well as members of the Council, of which latter I had then become part), the chairmanship of such enlarged committee falling to my lot—an office I am still privileged to hold, notwithstanding that I have long since vacated my seat on the governing Body, and, for general purposes, retired from the active pursuit of my profession. I ought here to say that not only do I not pretend to be writing with the knowledge or concurrence of my committee, but much less do I affect to speak for the Council of the Law Society, though unaware that my views are in any way at variance with those of my old colleagues who take special interest in County Court legislation.

The 1881 Committee practically terminated its labours when the 1888 Act was passed, which, though called a



Consolidating Act, went beyond consolidation. Up to that time I had not been able to find many followers on my theory of "merger," though now and again some of the Committee's recommendations on other subjects were utilised. I had, however, either from the Hall or the Dais, successfully moved a series of resolutions *re* County Courts, the principal one being that if we were not to have amalgamation, the Metropolitan Courts should be relieved from the trial of causes dealing with large sums, especially those actions which were initiated in the High Court, and "re-mitted" to the County Court for trial only, there being up to that date absolutely concurrent jurisdiction over £20. My particular scheme was that there should be a central Court, within eyeshot of the Temple, for the trial of these larger issues: moreover, as few solicitors carried on their businesses either in Bow, Chelsea or Lambeth, I urged that there should be a central Issuing Office for the whole of the Metropolis. Lord Herschell, the then Lord Chancellor, took a great interest in this project, which was on the high road to accomplishment (as fully noticed in the *Times* of that day), when the change of Government, not to speak of Lord Herschell's untimely death, indefinitely shelved the proposition.

But to return to 1846. The theory of the Act of that year was the bringing of justice to every man's door at a time when the High Court process was not only centralised in London (District Registries and the like being undreamt of), but when locomotion, if not in its infancy, was so altogether different to that of the present year of grace, that the original cause has lost its significance. Whatever may be the general opinion as to current County Court legislation, there can be but one as to the anomalous designation of the Court. If a London creditor desires to recover a penny over a hundred pounds from a person living in the middle of the Strand, the plaintiff ought, and indeed must,

issue a document called a writ of summons, at a building situated at the extreme east of the thoroughfare, the progress being under his sole command; whereas, if he wants to sue the same man for a penny less than a hundred pounds, he ought to start his process (indeed, must do so, unless he runs a risk as to costs) in a building situated some five hundred yards westward, where he takes out a "plaint," or, rather, allows an official to do so, simply receiving a "note" of the fact, and, except in certain instances which need not be particularised, parting company with the machinery of the action altogether. In the first-mentioned case the solicitor gets to know all about the debtor's defence, if any, while in the latter he may be entirely ignorant, up to the hearing, whether the debtor will be able to hold him at arm's length for a whole day or collapse during the first five minutes. This defect is a small matter in dealing with trifling claims, but a grave one where appreciable sums are in dispute, and the whole situation is absolutely anomalous. I do not stop to notice what are called "Default" summonses in the County Court (absolutely abortive against artful debtors), as I am only touching the fringe, just to see whether there is any sense whatever in designating the East Strand process as that of a "High" Court and the West Strand process as that of the "County" Court. As to the general appropriateness of the title County Court, considering that there are more than half-a-dozen of such Courts in the metropolis alone (Marylebone and Bloomsbury being about a quarter of an hour's walk from each other), the absolute absurdity of the name becomes apparent. I verily believe, as I before remarked, that the misnomer of the Court has been more or less a factor in its not being long ago turned into a Division of the Supreme Court.

Every practitioner knows that for upwards of twenty years after 1846 there was concurrent jurisdiction as to sums

exceeding forty shillings, and practically all London solicitors continued to go to the High Court. But as soon as twenty pounds became the minimum for securing costs in the High Court, plaintiffs were necessarily handicapped, and when, later on, costs in the High Court even up to fifty pounds were reduced to the sum that defendants would be liable to pay if the claim had been initiated in the County Court, the metropolitan members of the profession began to follow the course already generally adopted by provincial solicitors, who naturally favoured the County Court, even while the jurisdiction was concurrent, for the simple reason that High Court District Registries were then unknown and the local courts were handy. But the bulk of actions between twenty pounds and fifty pounds were still started in the Superior Court by London and Provincial solicitors alike (especially after High Court District Registries were established), because they had all become accustomed to the benefit of the summary judgment process in that Court which did not and does not to this hour exist in a County Court, the process being pursued up to the stage of summary contest, notwithstanding the risk of the costs being assessed at no higher than the County Court scale. Where plaintiffs in this preliminary canter succeeded in getting their "Order 14" judgment in the High Court, the costs were very liberally assessed, for the solicitor, beyond his personal allowances fixed in the County Court, got an equivalent to the poundage charged there, notwithstanding that the same had not in fact been paid. In other words, the statute was generously interpreted to mean that as a debtor was bound to pay as much for costs in the High Court as he would have had to pay in the County Court, a lump sum was allotted, though made up of imaginary figures as regards the out-of-pockets.

As to these high poundage fees in the County Court, everybody who has studied them agrees that they are often

prohibitive, because the *ad valorem* rate is not only charged on the Plaintiff and Judgment, but on the Execution, whether there be any goods or not. I made a suggestion in my 1881 paper as to this undoubted grievance (a suggestion over and over again endorsed by the Law Society at its public meetings), that the County Court official fees should be limited to five per cent., with a maximum of five shillings, on all Plaints; ten per cent., with a maximum of ten shillings, on Judgments; and five per cent., with a maximum of five shillings, on all Executions.

Among other suggestions in my 1881 paper was one that, whether the small debt process be called County Court or be attached to the High Court, there should be a personal application department similar to the Probate Registry, and that in all districts, of any size, days should be set apart for hearing cases in which no advocates appear. I also argued that an entire change should be made in dealing with applications *re* imprisonment for debt, casting the onus of proof on the debtor of his want of means, or at all events calling upon him for an authenticated summary of his affairs for a prescribed period, to curtail the wearisome preliminaries and loss of time at the opening of every application. Before this imprisonment process was relegated by the High Court to the County Court, the late Mr. Justice Cave (by thinly-veiled but well-known initials) lent a favourable ear to this proposal when joining in a *Times* discussion, wherein I and others took part, on practice reforms in general. I know that there are difficulties to be surmounted in small cases where debtors are poor and illiterate, but I submit that all such difficulties could be overcome by carefully devised rules, or perhaps by limiting the arrangement so as to make it applicable only to judgments originally exceeding five pounds.

To conclude, let me repeat my 1881 proposals (modified to bring them up to date), on the lines of the County Court

*not* being merged :—(1) Simplification of all originating process to make it akin to a High Court writ ; (2) Central Metropolitan Issuing Office ; (3) Central Metropolitan Court for trials of important cases ; (4) Similar provincial Courts in populous centres ; (5) Drastic reduction in official poundage ; (6) Remission to Registrars of cases up to five pounds ; (7) Introduction of High Court summary judgment process in cases over five pounds ; (8) Personal application department plus an entire separation of small debt business ; and (9) A simplification of the procedure as regards imprisonment of debtors. Each of these suggestions would, of course, involve safeguarding rules and regulations (with here and there possible exceptions), and certain judges would naturally be told off to preside over the larger trials, a possibly convenient stepping-stone to the re-adjustment of judicial salaries.

But has not the time now come for making the County Court a Branch of the High Court ? Not only did the Government Commission recommend it a generation ago, but the Legislature itself must have had the idea in mind, seeing that the Judicature Amendment Act expressly directed that as far as circumstances permitted the practice of the County Court should be made conformable to the superior Court. I am not for interfering with any of the special inferior Courts, such as the Mayor's Court, London (from which County Courts, if they are to exist, could take hints), as these tribunals are exceedingly useful and have already brought themselves more or less into line with the superior Court. I submit that the suggestion of amalgamation is doubly forcible now that the jurisdiction of the County Court is barely distinguishable from the High Court. Brougham's title, "Local District Courts," might perhaps be utilized—all else, such as changing the designation of the judges, with the needful revision of their duties and salaries, being a mere corollary.

FRANCIS K. MUNTON.

## VII.—CURRENT NOTES ON INTERNATIONAL LAW.

### France and Venezuela.

THE alleged improper treatment accorded to the French *Chargé d’Affaires*, M. Taigny, at La Guayra, is worthy of more discussion than it has yet received. A *Chargé d’Affaires*, though of the lowest grade of diplomatic officers, is nevertheless a diplomatist, representing his country, and entitled to all diplomatic immunities equally with an ambassador. But his diplomatic immunities do not make even an ambassador a chartered libertine. There is no doubt that, if he commits a breach of public order, he can be expelled. And although the usual course may be that of demanding his recall, yet in cases where this would take some time, it is difficult to refuse to the offended nation the power of forcible expulsion. Especially is this the case when the defiance of the local law had been wilful and flagrant.

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It seems that the French *Chargé d’Affaires*, though expressly and particularly informed that it was against the law, insisted on boarding a French steamer without the licence of the port authorities. The government refused to permit him to land again. Such a step certainly interfered with the business of the Legation: yet, for an act which was no legal offence at all, the British Ambassador was directed to quit his post at Washington at short notice, which involved almost as great an inconvenience. It can hardly be said that Venezuela was not justified in the simple refusal of re-admission to a minister who had left the shore in open contravention of the port regulations. Ambassadors are no more exempt than other people from the sanitary laws of a locality, although their liability may not be enforced by the ordinary criminal procedure. Venezuela did not assume

to fine Mr. Taigny, or to incarcerate him in prison. It cannot be doubted that she might properly have obstructed his having access to a particular vessel, just as she might have hindered him from striking anyone in the street, or from entering a private person's house. If she preferred to obstruct his return, he had only himself to blame for any consequent interference with the business of his office.

### **Ex-Territorial Capitulations.**

The attempt on the Sultan's life, made on July 15th, 1905, has resulted in a difficulty with Belgium. One of the persons arrested in consequence of that outrage was of Belgian nationality, and Belgium in virtue of a treaty of 1838 claims to possess the right to have alleged criminals of Belgian nationality tried by her own tribunals in Belgium. The procedure adopted by Turkey was to set up an extraordinary commission of investigation, which examined the Belgian, a man named Joris, and extracted a confession from him, in the presence of an official of the Belgian Consulate. In the presence of the same official he was subsequently sentenced, with 13 others, to death. (It will be remembered that the explosion was fatal to 26 persons, and 58 were injured.)

No question seems to have been raised by the Belgian Government until a late stage of the proceedings, when it was urged that the accused should be handed over to the Belgian authorities for trial. With memories, perhaps, of the Sipido fiasco, the Turks refused this. It is to be noted that the question has two aspects: the preliminary work of the commission, and the consequent trial. Without speaking too confidently, it would seem that the preliminary proceedings were regular. No country can be supposed, by its concession of capitulations, to intend to deprive itself of the power of making special inquiries into matters of high State policy. It is possible that, if Joris had been

recalcitrant, the Porte must have applied to the Belgian Legation for his coercion. But he did not (it seems), nor did the Legation, object to the examination. The trial is another thing.

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When we consider the actual words of the treaty applicable to trials, it reveals a very extraordinary state of things. It is usually considered that under these capitulations the jurisdiction of the Ottoman Courts is altogether ousted. If the Turkish text of the treaty in question is operative, this is not so. It provides (according to the *Times*) that Belgians, *when convicted*, shall be remitted to their own authorities for sentence and execution—“*seront punis par l'entremise de leur ministre, Chargé d'Affaires, consul ou vice-consul, selon l'usage établi à l'égard des autres Francs.*” This is startling, and the original French text does not agree with it: for it declares that “*en cas de crime ou de délit l'affaire sera remise à leur ministre [&c.]: les accusés seront jugés par lui, et punis selon l'usage, &c.*” It is more startling still to find that the procedure prescribed by the Turkish text is, as a matter of fact, actually followed, not only by Belgium but by other powers which have capitulations. Except in matters which concern the Occidental country alone, it seems that the almost invariable course is for it to allow the Turkish Court to proceed to judgment, and to ratify its sentence by the presence of the legation dragoman. So, at least, says the *Times* correspondent,<sup>1</sup> already quoted.

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The clear meaning of the treaty in its Turkish form is that, after trial and verdict, the foreign authority shall assume the accused's guilt, and shall proceed to inflict an appropriate penalty. It is not to the point, that it cannot inflict it in its own territory, owing to legal difficulties in the way in cases where no domestic judgment has been

<sup>1</sup> *Times*, January 26, 1906.



rendered. It can, and ought to, provide for this difficulty; and if it has not done so, it must do its best to inflict a proper penalty in Turkey. But even assuming the French text to be the only binding one, and not invalidated by discrepancy with the Turkish version, it would still seem that Belgium had acquiesced in the trial by the Turkish Court, and is concluded by its result. In that event, her sole claim would be to have Joris delivered up, not (as it seems to be assumed must necessarily be the case) for extradition and a new trial in Belgium, but for appropriate penalties to be inflicted on him.

### Domicile.

Divorce cases are beginning to rival testamentary causes in affording enlightenment on questions of the due determination of domicile. In *Fitzgerald v. F.*, the family history of the respondent was gone into at great length, with the view of establishing an Irish domicile. (*Times*, February 7, 1906.) The respondent was born in London of domiciled English parents, was educated in England, and was abroad when he came of age in 1886. He had become entitled to very extensive entailed property in Ireland in 1879, and had spent part of his holidays there with a married sister who occupied the mansion-house, though staying mainly with his mother at Bournemouth. After attaining majority, he spent two consecutive years in Ireland (from his 22nd to 24th years. He then went to California, and married, returning in 1896, when he again spent two years in Ireland. Going back to California in 1898, he lost his wife, took the remains to Waterford, returned to California in 1899, re-married, and brought the second wife back to Ireland. They returned, after an interval, to California, but in 1903 were back in Ireland, where the respondent began to rebuild extensively. Leaving the (3) children there in 1904, they came to England and separated. In documents the

respondent was variously described. He made his children wards of the English Court in 1904, having previously brought them to Cheltenham. On these facts, it seems difficult to say that the respondent's declaration that he considered himself domiciled in Ireland can be accepted as true in any but a loose, popular sense: and the cross-examination need hardly have been directed to proving an ancestral connection with England, through the fact of his uncle's being "the translator of Omar Khayyam and a Cambridge man," and of his grandfather's being sheriff of Suffolk. The domicile of origin was English, and there can hardly be said to have been proved any settled intention to change it. If the decision to the contrary of *Gorell Barnes, P.*, is correct (20th February, 1906), it would almost follow that the mere possession of ancestral property in a country is sufficient to displace the ordinary rules of domicile altogether.

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### Renvoi.

In *Armitage v. A.-G.*, the doctrine of *Renvoi* in a somewhat crude form was apparently applied, to determine the question of the jurisdiction of a Dakota Court to dissolve an English marriage. The petitioner sought to have a subsequent Colorado marriage declared valid in England under the Legitimacy Declaration Act, 1888. As that was a marriage with a domiciled Englishman, the English Court entertained the suit. The alleged ground of invalidity was the prior marriage of the petitioner, then a British subject, with a domiciled citizen of New York. This prior marriage was supposed to have been got rid of in the following way. The Court authorised (according to English principles) to dissolve it was the Court of the State of New York, the husband's domicile. But, in the circumstances of the case, it was proved that the Courts of New York were prepared to recognise a divorce granted in

Dakota. Therefore, it was argued, the English Court ought to recognise the Dakota decree as well.

The dangers of such a mode of reasoning are patent. It is a very different thing to give effect to a decree in the husband's domicile, and to give effect to what is supposed to be the law of the husband's domicile as to the recognition of divorces passed in other jurisdictions. The President, however (*Times*, February 26, 1906), decided that he could treat the English marriage as dissolved, and made the declaration asked for. He took occasion to question Professor Dicey's opinion that parties can confer jurisdiction in divorce upon any Court by submission to it, but he held that the domicile of the husband in New York imported into the case all the New York theories of jurisdiction and rules of Private International law.

It is to be noted that the President laid no stress on the fact that the divorce was granted by a Court of the parties' nationality. The opinion is sometimes advanced that an English Court is bound to recognise the decrees of a foreign Court regarding the status of its own subjects; and of course for this purpose the English Court could not go into the question of whether the Dakota or the New York Court was the competent forum by United States law. But it is evident that to recognize foreign divorces of foreign subjects domiciled here, whilst declining to divorce British subjects domiciled abroad, would amount to a highly improbable abnegation of jurisdiction.

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### In re Johnson.

In fact, one great practical danger of *renvoi* is this, that the English Court will misunderstand the foreign rules of Private International law. There is no reason to suppose that it did so in *Armitage v. A.-G.*, where two American lawyers of standing (Mr. J. Arthur Barrett and Mr. Hendry) concurred in their statement of the New York law. But

a letter appears in the *Law Times* of February 17th, 1906, written by a German lawyer, in which he states that the law of the Grand Duchy of Baden was entirely misapprehended in the celebrated case of *In re Johnson*. The law of Baden is said by him to provide for the very case in question, and expressly to enact that where a foreigner has a country the law of which confers on him a personal law depending upon domicile, the law of his domicile shall be held to be his personal law in Baden. Baden and Maltese law, therefore, on this theory concurred in prescribing Baden law as the personal law of the *de cuius*.

### Matrimonial Domicile.

The law of "the Matrimonial Domicile" is now little more than *prima facie* the proper law of marriage contracts; and the supposed intention of the parties to choose a law is regarded as of more importance than their evident intention to make their home in a particular place. But intention is always liable to be misinterpreted. Take, for instance, the case of *Hope-Vere v. H.-V.*, a contest between divorced consorts.<sup>1</sup> The defender was a domiciled Scottish subject; the pursuer (previously a domiciled French subject) was married to him in Paris, contemplating matrimonial residence in Scotland. Two contracts were entered into on the occasion: one in French form and language, and the other in the form and language usual in Scotland. It was argued that both were to be interpreted according to Scots law. That law gave the pursuer no right to receive a certain annuity, charged on lands in the Scottish document, on divorce, but only on the actual death of the defender. It was alleged that the French document also fell to be interpreted by Scottish law; and bound the defender personally to pay the annuity in question (in which case it would be enforceable, by the law of Scotland, on the termination of the marriage from whatever cause).

<sup>1</sup> Sc. L. T. Rep., XIII, 774.

The translated French document was held by the Court to contain (what the Scottish one did not) a personal covenant to pay the annuity. Probably French law would have led to the same conclusion. But the effect of a divorce on such a provision, if governed by French law, appears to have been at least doubtful. Lord Salvesen held that the operation of the French provision must be governed by Scottish law, and accordingly that it was enforceable in case of divorce.

### **Hague Conference.**

According to the *Times*, the anticipated Conference will be invited to meet under the Emperor of Russia's auspices, at The Hague this autumn. The proposals for discussion comprise (1), amendments of the prior Convention as to land warfare: (2), the adoption of rules regulating naval bombardment, and mine or torpedo warfare; (3), rules for the assumption of the military character by ships and the stay of belligerent vessels in neutral ports; (4), the treatment of enemy goods at sea and the question of time allowance to their merchantmen to leave port; (5), the rights of neutrals at sea, contraband, and the destruction of prizes.

### **Algeciras Conference.**

The somewhat wearisome division (in theory) of the skin of the Moorish bear has at last been concluded. The much more difficult business of carrying it out in practice will be watched with interest. The abdication by Morocco of the practical exercise of sovereignty in her eight principal sea-ports entails several curious consequences. Can these ports be the subject of hostile action directed against Morocco? Who will support the police against an insurrection or a raid? What law will the police enforce, and who will be its judicial interpreters? An endless series of difficulties

may arise from the anomalous situation which is the outcome of the Algeciras debates. Of the multiple control to be exercised by the Conference Powers over the finance of Morocco, the less said the better. Its complicated provisions seem designed to promote uncertainty and conflict. An important clause however is that by which Morocco undertakes to allow aliens to purchase land and buildings.

### Foreign Charities.

A propos of *In re Vagliano* (L. T., Dec. 16, 1905, p. 52), noted last February, we now observe that in *In re Dymond* (*Times*, April 2, 1906) Swinfen Eady, J., on the application of executors, directed the proceeds of the net residue of an estate to be paid to the Moderator of the Waldensian Church. The bequest had been made to "the society known as the Waldensian Church Mission in Italy in aid of the work of Evangelization carried on by that institution in Italy." "The Moderator" of "that institution" was empowered by the will to give receipts. We cannot distinguish this decision from that in *In re Vagliano*, where Buckley, J., directed a scheme; and, for the reasons stated in our last issue, we prefer the former.

### Divorce—Domicile.

We only mention the approval by the Court of Appeal of *Bater v. Bater*, otherwise *Lowe*<sup>1</sup> (*Times*, March 30, 1906), in order to remark that the judges finally exploded the argument, drawn from *Lolley's Case*, that a foreign Court cannot annul an "English" marriage. The parties were of British nationality, married when domiciled in England. The Courts of a subsequent foreign domicile were nevertheless fully recognised as the sole Courts competent upon English principles to dissolve the marriage.

T. BATY.

<sup>1</sup> See *Law Magazine and Review*, Aug. 1905, p. 479.

## VIII.—NOTES ON RECENT CASES (ENGLISH).

*Gilbey v. Rush* (L. R. [1906], 1 Ch. 11), is an interesting decision as to what constitutes a "principal mansion house" and what amounts to a "consent" of the trustees to a lease of it within the Settled Land Acts, 1882—1890. The facts were as follows: Two estates had been settled by will to the same uses. Each estate had upon it a mansion house. Evidence was given to show that one of these mansion houses was larger than the other, and had been for a long time looked upon as the "big house" of the settled estates. The life tenant had leased the smaller house. The trustees knew of the lease and fully approved of it, but the approval had not been communicated either to the lessor or lessee. Held, that the smaller house was not "the principal mansion house" of the settled lands, and that the unexpressed approval of the trustees was a sufficient "consent" to satisfy the Acts. Kekewich, J., in coming to these conclusions, admitted that there might be two principal mansion houses on the same settled lands, but on the evidence he held, though not very confidently, that that was not the case here. On the second point he showed that a consent within the Acts need not be in writing nor even communicated to the parties, but it must not be retrospective and it must be *ad hoc*—that is, given by the trustees as trustees to the particular lease in contemplation, after considering the advantages and disadvantages as regarded the interests of all taking under the settlement.

The Chancery Division seems to be getting less inclined to refuse specific performance of contracts on the ground that they are of a kind the execution of which the Court cannot supervise effectively. The King's Bench set it the example in this respect, in *Wolverhampton Corporation v. Emmons* (L. R. [1901], 1 K. B. 515), where it was held that when a person

obtains possession of land on the faith of a contract to build upon it in a certain way, then, if that way is sufficiently defined by the contract, and damages will not be an adequate compensation for breach, the Court will specifically enforce the contract. In that case, the contract was to build according to definite plans which had been prepared under a general scheme of improvement undertaken by the city corporation. Here, evidently, no damages could compensate the corporation for having the scheme of improvement frustrated by the defendant refusing to carry out his share of it. In *Molyncux v. Richard* (L. R. [1906], 1 Ch. 34), the principle of *Wolverhampton Corporation v. Emmons* (*supra*) has been carried farther—perhaps a little too far. There, under a lease for 99 years, the lessee covenanted to build within three years houses similar to other houses in the same street—which houses themselves were not quite similar. The lessor was not the owner of the mines underlying the land demised, and the owner of such minerals was entitled, for the purpose of getting them to destroy the surface. After the granting of the lease the lessee acquired a lease of the minerals, and so became entitled to destroy any houses he might erect. Long after the three years had expired, and when the land demised was covered with spoil from the minerals, the lessor's mortgagee brought an action to enforce the building covenant. Kekewich, J., granted specific performance. It seems clear, if this decision is good, that the restrictions put by the Court of Appeal on the right to specific performance of an agreement to build, are practically abolished or rather illusory.

Note that the rule of interpretation by which the word "survivors" is read as equivalent to "others" applies equally to settlements by deed and will. In *re Friend's Settlement*, *Cole v. Allcot* (L. R. [1906], 1 Ch. 47).



Note, too, that the doctrine of vendor's lien for unpaid purchase-money applies to personalty as well as realty, with this difference, that the Statutes of Limitations do not apply to actions to enforce it against personalty. *In re Stucley, Stucley v. Kekewich* (L. R. [1906], 1 Ch. 67).

The case of *Macmillan & Co. v. Dent* (L. R. [1906], 1 Ch. 101) has occasioned much somewhat uninformed controversy in the newspapers as to the copyright in the letters of a deceased person. There certain persons possessed unpublished letters of Charles Lamb. They sold the copyright in them to the plaintiffs. The plaintiffs published the letters without any objection being taken by Charles Lamb's personal representatives. Subsequently the same persons sold the letters themselves to the defendant, and Charles Lamb's personal representatives assigned any right they might have to him. The defendant then published the letters. In an action for piracy the defendant argued that the copyright was in the personal representatives, and sect. 3 of the Copyright Act 1842, which gives the copyright in writings not published during the author's life to the owner of the author's manuscript, must refer to the owner of the "literary composition" (*i. e.*, the personal representatives), and not the owner of the paper on which it is written. When it is remembered that under this Act there is no copyright at all until *after* publication, the force of this argument is apparent. The learned judge's decision—that there is a right to prevent publication in the personal representatives until the letters are published, and that after publication the copyright is in the owner of the manuscript—seems both good law and good sense.

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In *In re Sampson, Sampson v. Sampson* (L. R. [1906], 1 Ch. 435), Kekewich, J., has decided that under the statutory power given by sect. 10 of the Trustee Act 1893, to appoint

new trustees, the donee of the power cannot appoint himself. The decision turned on the words of the section—that the statutory donee could appoint “another person or other persons.” Taken in their plain sense, these words mean another person or other persons than the former trustees. His lordship also questioned the decision in *Montefiore v. Guedalla* (L. R. [1903], 2 Ch. 723). That case, it is submitted, drew the proper distinction between a general power of appointing new trustees and the proper exercise of such power. It held that where the extent of the power is not expressly limited the donee may appoint himself, but that as a rule such an appointment may be revoked by the Court as improper. Where circumstances make it especially desirable, it is good. This seems common sense.

Note that a squatter who acquires a title to land by long possession, acquires no better title in equity than the true owner had. *In re Nisbet & Pott's Contract* (L. R. [1906], 1 Ch. 386.)

In *In re Loveland, Loveland v. Loveland* (L. R. [1906], 1 Ch. 542), Buckley, J., held that a testator might by will provide for the illegitimate children who might be born to a woman at any time before the testator's death. The same point precisely was decided by Deane, J., in the Probate Division, in *In the Estate of Frogley* (L. R. [1906], P. 137). Strange to say, that decision does not seem to have been cited in argument.

J. A. S.

The judgment, as generous in length as it is spacious in illustration, in *Carringtons Ltd. v. Smith* (L. R. [1906], 1 K. B. 79; 93 L. T. R. 779; 75 L. J. R., K. B. 49) will probably be acquiesced in, for it is difficult, in any but extreme cases, to call “harsh and unconscionable” the terms of a loan to which “a person of intelligence and business habits” binds

himself. But as far as the judgment was influenced by the assumed unsubstantial nature of the security, it may be pointed out that borrowers who have strong securities at command seek relief from pecuniary pressure through a less ravenous liberator than a professional money lender, and that the security offered here satisfied an astute practitioner, who, whatever it had been, would have imposed much the same rate of interest. When the Statute 17 & 18 Vict., c. 90, enacted that "all existing laws against usury shall be repealed," it was a necessary consequence that the same freedom of contract became linked to the use of money as applied to any other serviceable commodity. And though the Money Lenders' Act of 1900 gives power to review loan bargains, the Courts can exercise the power only over a transaction which, in addition to carrying an interest that this judge or that may hold to be excessive, has the still more perplexing flagrancy of being "harsh and unconscionable" or otherwise such that a Court of Equity would give relief. It is the interest exacted that is really the ultimate test. In the present case it was seventy-five per cent. What if it had been ten times as high?

In the foregoing case a useful if unintended hint to the inexperienced, who are invited to come into the usurer's parlour, is conveyed by the suggestion of the learned judge, that a borrower's readiness to pay a high rate would augment the lender's expression of the risk. From another remark it might be inferred that if the defendant had not "immediately agreed to give without any bargaining or remonstrance" the terms proposed, he might have come within the protection of the Act.

The anxiety of the Lord Chief Justice to have his judgment in *Perring & Co. v. Emerson* (L. R. [1906], 1 K. B. 1; 93 L. T. R. 748; 75 L. J. R., K. B. 12) considered by a Court of Appeal seems superfluous, and "the very considerable

difficulty" which he experienced in the case appears to rest as much on the facts as on the law. The main controversy was whether sect. 7 of the Law of Distress Amendment Act 1888 applied only as between landlord and tenant, or extended to protect suppliers of furniture on the hire-purchase system to a tenant who falls into arrears to them on their agreement and to his landlord for rent. The furnishers, under their powers, removed the goods from the tenant's rooms into their vans without regard to a claim to levy made by an uncertificated servant of the landlord. While the loaded van was still on ground of the landlord, but not part of the demise, the goods were seized for him by a qualified bailiff and were subsequently sold. As to the first seizure, sect. 7 of the Act is explicit that no person but a certificated bailiff can levy for rent, and that any person not so qualified who does, and anyone who authorises him, commit a trespass. The Court decided in favour of the furnishers, and the judgment of Wills, J., is the answer to the "difficulty," for he pointed out, as to the first seizure, that an act declared to be illegal cannot confer any rights on those who practice it, and the object of declaring the offence to be a trespass was probably the merciful one of saving the presumptuous captor from a charge of misdemeanour, to which, in the absence of such a declaration, he would have been liable. As to the second seizure, the point on the side of the landlord, that the goods were taken while on his own land, seems to have been abandoned because of *Capel v. Buszard* ([1829], 6 Bing. 150). The relinquishment might more properly have been based on Comyn's *Digest*, which limits the right to distrain for rent to any part of the land out of which the rent issues. In *Capel v. Buszard* the unsuccessful claim was to seize barges lying in the open Thames and merely by rope attached to a wharf on which a distraint was made for rent. And in this case the Chief Justice of the Common Pleas differed from his colleagues.

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Another case of distraint, "interesting and novel," as the Lord Chief Justice rightly called it, is *Lavell v. Richings* (L. R. [1906], 1 K. B. 480; 75 L. J. R., K. B. 287), where a cab let at a weekly charge to a driver and kept by him in a stable which he rented, where there was nothing else of value, was seized by the landlord, and, though worth six times his claim for rent, sold by auction. The Court held that the cab was an implement of trade within sect. 147 of the County Court Act 1888, notwithstanding that the driver could, without loss, hire another on ordinary terms and resume his business at once; and that the intention of the section is, that on the seizure of tools of a workman at least £5 worth is to be left in his possession. As the cab was indivisible it was therefore protected from seizure. The Court's opinion that "the circumstances are exceptional and not likely to occur again" is possibly justified; but there will be a recurrent vitality in the rule itself.

*Mansel v. Itchen Overseers* (L. R. [1906], 1 K. B. 221; 75 L. J. R., K. B. 232) will be read with regret by that considerable body of ratepayers who wish to retain all possible dilatory defences against the displeasing advances of the collector. It has been their belief that a demand for rates is not valid unless it be made for no more than the exact amount that is due, and their faith has been justified by many cases. Perhaps the most decisive and curious of all these was *Morton v. Brammer* ([1860], 8 C. B., N. S., 791), where a demand for one shilling and fivepence was made upon a man, who having a turn for precise arithmetical investigation, was able to demonstrate that the amount of his liability was one shilling and fourpence three farthings plus a fraction of a farthing. And on this proof he was able to defeat the cupidity of the overseers, for the bench of Judges held that a "ratepayer ought not to be called upon to pay beyond the exact sum due in

respect of the assessment. If that involves the fraction of a farthing he cannot be called upon to pay the farthing." Now *Mansel v. Itchen Overseers* has decided that where for instance a tenant gives up occupation during a term, for the amount due on the entire period of which a demand note has been delivered, his neglect to pay any part is a refusal to pay the sum due, and as soon as the right sum is ascertained, the justices can without a revised demand issue a warrant forthwith.

In some parishes there is a custom, where occupation has been given up in the course of a term, to require payment of the full amount of the original demand and to return to the ratepayer subsequently the amount overpaid. This practice will have to be amended.

Employers should take care that they have the sole ownership of all books and documents in which accounts to be submitted to them are entered by their servants, for sect. 1 of the Falsification of Accounts Act 1875 has, when read with the preamble, been held in *Rex v. Palin* (L. R. [1906], 1 K. B. 7; 93 L. T. R. 673; 75 L. J. R., K. B. 15) to apply only to such records as are the employer's property; and the conviction of a man who had made false entries in his own book for his employer to act upon was quashed.

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T. J. B.

### SCOTCH CASES.

Hire-purchase agreements often occupy the attention of the inferior courts of Scotland although the great majority of the cases, being for small amounts, never reach the law reports. Occasionally we have an appeal to the justiciary court from the sheriff's small-debt court, but it is only in very exceptional circumstances that such an appeal is competent. Such an exceptional case was that of *Singer*

*Manufacturing Company v. Beale & Mactavish* (16th Nov., 1905, 43 S. L. R. 58), where, as in most of these cases, the action was one of damages for an illegal sale by the landlord of the premises in which the hire-purchased article was placed by the hire-purchaser. The sheriff-substitute in his small-debt court awarded damages, but the court of appeal reversed, finding no damages due. The divergent views represent the distinction between such cases as *Lee v. Butler* (L. R. [1893], 2 Q. B. 318) and *Helby v. Matthews* (L. R. [1895], A. C. 471). The sheriff-substitute proceeded upon the ground that the case before him was a real case of hire-purchase, as in *Helby v. Matthews*, and not a sale under the guise of hire-purchase as in *Lee v. Butler*. But, as pointed out in the appeal, the circumstances all pointed to the transaction being an actual sale in which the price was payable by instalments. This was proved by the form of the summons, which concluded for the full purchase price of the article (a sewing machine) less the hire received. In other words, the so-called instalments of hire not yet earned were sued for as a debt fully due, whereas in *Helby v. Matthews*, the criterion of a real hire-purchase was held to be the right of the hire-purchaser to return the article at any time without liability for hire except so far as actually earned. In the case now under notice the justiciary court consisting of Lords Ardwall and Johnston was of opinion that the hire-purchase agreement amounted to a sale, and was thus brought under the 25th section of the Sale of Goods Act, which establishes a reputed ownership as against the true owner under the latent agreement.

A point of International law similar to that raised in *Convery's Case* (see *L. M. & R.*, Feb., p. 213) was suggested in argument in *Baird & Company Limited v. Savage* (43 S. L. R. 300), but it was not found necessary to import the argument into the judgment. The main point was whether a wife was

wholly dependent upon her husband's earnings within the meaning of the Workmen's Compensation Act 1897. It was held in the circumstances that she was not wholly dependent, but that she was partially dependent within the meaning of section 7, sub-section 2 (b) of the Act referred to. The international question raised in argument was founded on the fact that the deceased workman was a Pole who had only resided in this country for nine months, and that his wife, the claimant, was also a Pole who up to the date of the accident had never left Poland. It was argued for the defenders that the definition of "dependants" excluded dependants outside England, Scotland and Ireland, otherwise the Act might be more favourable to foreigners than to British subjects, since the latter had, in order to obtain the benefit of the Act, to fulfil conditions which might not apply to the former. In this view, therefore, the claimant was not a "dependant" within the meaning of the Act. To this it was answered that the Act did not in terms exclude foreigners, and to exclude them would be an unjustifiable variation of the Common law rule that nationality is not a bar to reparation. Although the reasons were not discussed in the judgment, the fact that the Polish wife was held entitled to a certain amount of compensation effectually disposed of the argument founded on her nationality as a bar to her claim.

Quite a number of international questions were dealt with by the Scottish courts during the quarter. In addition to that mentioned above, and to some others which we have not space to note, an interesting question was raised as to the effect of intermarriage between persons domiciled in England and Scotland respectively. In *Westerman v. Schwab and Others* (43 S. L. R. 161), the husband was Scotch while the lady was English. Previous to her marriage, which took place in England, Mrs. Westerman had executed a



will dealing with her personal estate. After her marriage she went with her husband to Aberdeen, where after a few years of married life she died without issue. Her husband died a month afterwards without leaving a settlement, and without having expedite confirmation of his wife's estate. There was no question as to the right of the husband's representatives to one-half of the wife's estate as *jus relictii*, but in regard to the remaining half a competition arose between the legatees under the wife's will, executed while she was a spinster, and the wife's next-of-kin. The next-of-kin founded upon the Wills Act of 1837, sect. 18, which provides that "every will made by a man or woman shall be revoked by his or her marriage." On the other hand, the legatees argued that as the Wills Act does not apply to Scotland, and as the lady by the very fact of her marriage became a domiciled Scotswoman, the English rule of implied revocation was excluded, and the Scottish rule, which does not imply revocation except in a question with children, took its place. In the sheriff court, where the case originated, the sheriff-substitute found the will valid notwithstanding the subsequent marriage. The sheriff, on appeal, reversed and found the will revoked by the marriage, while on further appeal the Court of Session reverted to the view of the sheriff-substitute, which in the opinion of the Lord President was well expressed in these words: "It is the law of the testatrix's domicile at the time of her death that determines the validity of the will. The testatrix died a Scotchwoman . . . . No doubt if the testatrix here had married an Englishman the will would have been *ipso facto* revoked as if it had never been, and could not have been resuscitated even though she afterwards acquired a Scottish domicile. But the case here is different. The act that would otherwise have revoked the will exempted the testatrix from the provisions of the revoking statute." The case is further interesting on account of

the detailed examination by the Lord President and Lord Kinnear of the somewhat difficult case of *Loustalan v. Loustalan* (L. R. [1900], P. 211).

R. B.

### IRISH CASES.

*Cunningham v. Frontier S. S. Co.* ([1906], 2 Ir. R. 12), is an interesting case upon the duties of shipowners and masters under sect. 458 of the Merchant Shipping Act 1894. That section provides that in every contract of service between a shipowner and the master or any seaman, there shall be implied an obligation on the owner's part that the owner, the master, and every agent charged with the loading, the preparing of the ship for sea, or the sending of the ship to sea, shall use all reasonable means to insure the seaworthiness of the ship for sea at the time when the voyage commences, and to keep her in a seaworthy condition for the voyage during the voyage. The action was brought under Lord Campbell's Act by the representatives of deceased seamen. The ship was chartered to convey a cargo of maize in bulk from Liverpool to Galway, and the charter-party bound the charterers to supply sufficient bags for stowage of the cargo if required. The cargo of 632 tons was loaded in bulk under the directions of a stevedore, and 111 bags were placed in coverings under the forward hatch. The ship had fine weather from Liverpool to Lough Swilly, but she put in there with a list which various witnesses estimated at such different amounts as 5 to 20 degrees. Nothing was done to correct the list, and after about 12 hours she proceeded on her voyage. The list increased, and she foundered in a gale which the evidence showed to have been severe but not exceptional. The jury found (a) that as regards bagging and stowage all reasonable and proper precautions to prevent the cargo shifting had not been taken; (b) that the vessel became unseaworthy by reason of

a list existing when she was in Lough Swilly; (c) that such list was caused by the cargo shifting by reason of proper precautions not having been taken. It was held by the Court of Appeal that there was evidence to sustain these findings, both as regards improper stowage and unseaworthiness on leaving Lough Swilly; and that consequently there was a breach of the owner's obligation under sect. 458, and that the plaintiffs were entitled to recover. Palles, C.B., preferred to base his judgment on the view that there had been a default by the master in leaving Lough Swilly with a dangerous list, which amounted to a failure to *keep* the ship in a seaworthy condition during the voyage.

*Sweeney v. Coote* ([1906], 1 Ir. R. 51), is a case on the law of conspiracy, which is of course a burning question just at present. But like many such cases, it can hardly be said to add much to one's legal knowledge, for the long report is largely made up of judicial dissertations on the facts. The plaintiff was a Roman Catholic school-mistress, who was appointed manual instructress in a National School which was under Presbyterian management. To this appointment the defendant, a Protestant and a man of some influence in the district, objected. He called a meeting of parents whose children attended the school, and at that meeting most of those present arranged to withdraw their children from attendance. The effect of this was to cause pecuniary loss to the plaintiff by diminishing her capitation grant. The Court of Appeal held, virtually, that this loss was *damnum sine injuria*: for even admitting that there was a combination of the defendant and others, and that the result of that combination was to cause loss to the plaintiff, and that the occurrence of such loss was contemplated by the defendant as a result of the combination—still the object of the combination was not unlawful, nor were any unlawful means used. It is unnecessary to analyse the judgments, which as we

have said were mostly concerned with the evidence. But we may note that Fitzgibbon, L.J., found "no authority or principle to support the proposition that an act may be done by each of two people without incurring any legal liability for loss consequent thereon, and yet that the same act, done in the same way with the same intent and with the same consequences, will be actionable if it is done in pursuance of an agreement made between them."

The House of Lords decided in *Grimond v. Grimond* (L. R. [1905], A. C. 124) that, where a testator directed his trustees to divide a portion of his estate among such charitable or religious institutions and societies as they might select, the bequest was void for uncertainty. In *Arnott v. Arnott* ([1906], 1 Ir. R. 127), the Master of the Rolls has held that this was purely a decision upon Scotch law; and that under English law a gift of a sum upon trust to apply the income for such religious purposes as the trustees should in their uncontrolled discretion think fit is not void for uncertainty.

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A wife insured her life in favour of her husband; the policy-money was expressed to be payable to the husband, and his executors, administrators or assigns, on the wife's death. The husband paid the premiums. He having died in the wife's lifetime—*held*, under sect. 11 of the Married Women's Property Act 1882, that the policy belonged to the husband's executors and not to the wife, since the trust created by sect. 11 and by the policy was not dependent on the husband surviving his wife. *Prescott v. Prescott* ([1906], 1 Ir. R. 155).

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Although, in view of probable legislation upon workmen's compensation, decisions under the Act of 1897 are not generally of so much value as formerly, still the law as to "dependency" is not likely to be much affected. *Queen v.*

*Clarke* ([1906], 2 Ir. R. 135) is an interesting case as to the dependency of a wife upon her husband's earnings. The applicant in this case was a widow, whose husband was killed in January 1905 in the course of his employment in a trade coming within the Act. She had been married in July 1904 in Scotland, and had lived with her husband in Scotland till October 1904. The husband then left Scotland in search of work, and the wife went to live with her father in Glasgow and was supported by him. The husband contributed nothing to her support from the time of his leaving Scotland till his death. The Court of Appeal held that the applicant was "wholly dependent" upon the earnings of the husband at the time of his death, within the meaning of sect. 7 (2) (a) of the Workmen's Compensation Act 1897. In this the majority thought they were following *Coulthard's Case* (L. R. [1905], 2 K. B. 872). There was, however, a vigorous dissenting judgment of Fitzgibbon, L.J., who thought there was evidence that the wife was *in fact* partially dependent on her father for support at the time of her husband's death, and that therefore she could not *in law* be said to be wholly dependent on her husband. There does, however, seem to be ground for making a distinction between "support," which is matter of fact, and "dependency," which is matter of law.

J. S. B.

## Reviews.

[SHORT NOTICES DO NOT PRECLUDE REVIEWS AT GREATER LENGTH IN SUBSEQUENT ISSUES.]

*A Treatise on Belgian Law.* By E. TODD. London: Butterworth & Co. 1905.

The commercial importance and the near neighbourhood of Belgium make it especially desirable that there should be readily accessible in English some authoritative exposition of its jurisprudence. Mr. Todd supplies this want by translating and setting out the Code of Civil Procedure and the Commercial Code in full. The earlier pages of his book are taken up by a commentary on these codes. For the student of Comparative law, the exposition of Belgian practice which he gives is likely to be of service. From a more practical point of view the Commercial Code, with its commentary, as set out by Mr. Todd, cannot fail to be of the greatest use. Code and commentary, however, do not invariably agree in the English rendering of the original; thus, at page 110, "receipt" of goods is spoken of in a case where the Code (p. 411) treats of "acceptance"; and the right of action given against carriers in respect of special stipulations or latent damage, is cut down in the commentary to a right of action by special stipulation for latent damage. Again, on page 40, certain goods are said to be exempt from levy, "except" for a debt due to the State; whereas the Code (p. 292) expresses them to be exempt "even" for such a debt. There are also a few clerical errors which should be corrected in a future edition—surely "but" (p. 110, line 2) should be "who."?

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*English Prize Cases.* 2 Vols. Edited by E. S. ROSCOE. London: Stevens & Sons. 1905.

This is a work somewhat similar in its plan and execution to the *Revised Reports*, but dealing solely with cases of Prize. It is published under the competent editorship of the learned Registrar in Admiralty. The typography and *format* of the volumes are excellent, and there is a very useful and convenient table of cases and chronological land-marks. A list of Admiralty judges is also appended, which serves to remind us that there were such judges before Lord Stowell. Penrice (1715-1751), was perhaps a better

judge than Salusbury (1751-1773), who thought oil was contraband. Marriott's caustic flippancy compares badly with the polished dignity of his successor, or with the easy good-nature of Sir George Hay, who preceded him. His judgment in *The Renard*, in which he pours the vials of contempt alike on Grotius, for being original; on Bynkershoek, for differing from Grotius, and on Brooke, for being nonsensical, is a model of bad law and bad style. With Lord Stowell, judicial calm returned to the Admiralty Court. It may be regretted that the scheme of the work prevented the inclusion in it of every Prize case not clearly valueless. Burrell's Reports, for instance, cannot always be easy to procure, and are represented by very few citations; yet such cases as *The Young Peter* (Burr., p. 184); *The Trois Amies* (p. 187); *The General Murray* (p. 197); *The Vrouw Clara* (p. 212); *The Constantia* (p. 208); and *The D. Nellta* (p. 200), can be hardly be rejected as mere decisions on conflicts of evidence. The Monte Cristi cases, again, are of capital importance in the doctrine of continuous voyage. Nor, to cite at random from among later decisions, do we find reported such cases as *The Hendrick and Alida* (Hay & M., p. 96); *The William and Grace* (*ib.*, p. 76); *The Little William* (1 Acton, 141), (where Grant and Nicholl over-ruled Scott); *The Amedie* (*ib.*, 240); *The Rose in Bloom* (1 Dods. 57); *The Ebenezer* (6 C. Robins, 250); or *The Richmond* (5 *ib.*, 325), (a case dilated on by "Historicus"). The leading case of *The Ionian Ships* (Spinks, p. 193) is also omitted as turning on a question of fact. It must always be a moot question how far the inclusion of particular cases is worth the space they occupy, but in a work of this magnitude and importance it might perhaps have been better to have erred on the side of comprehensiveness.

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*Middle Temple Records.* Minutes of Parliament of the Middle Temple. Vols. I—IV. Translated and edited by C. T. MARTIN, B.A., F.S.A.; with an Inquiry into the origin and early history of the Inn by JOHN HUTCHINSON. London: Published by order of the Masters of the Bench and sold by Butterworth & Co. 1904-5.

These handsome volumes contain the Minutes of Parliament from 1501-1703, with the exception of a gap of about 27 years, from 1524 to 1551. The whole is translated from the Latin—where necessary—by Mr. C. T. Martin, who has added occasional foot-notes, but we wish he had given us more of these notes as there are some words we do not understand. One instance is "lucidarys,"

for an explanation of which we had to refer to the new Oxford Dictionary, where we found again the quotation we had been considering. The learned Librarian of the Middle Temple contributes a short introductory account of the origin and early history of his Inn, which is well worth perusal. A considerable portion of it is devoted to an argument against any claim on the part of the Inner Temple to be the older and parent house. He adopts what he calls the "never-one theory," and considers the History of the Middle Temple "may be traced back to a society existing before the occupation of the Temple, which side by side, and simultaneously with the Society now known as the Inner Temple, took up its residence there, and became a co-tenant of its grounds and buildings." The Minutes are contained in the first three volumes, the fourth contains a useful index of names and places. We do not propose to refer at length to the varied contents of these volumes. The late Mr. Hopwood, K.C., published a most interesting selection of extracts in his *Calendar of Middle Temple Records*, which was reviewed in our February Number of 1904. It was there noticed that no reference could be found either to the opening of the New Hall, by Queen Elizabeth in person, in 1576, or to the performance in the same hall of Shakespeare's "Twelfth Night" in 1601. We have searched the Minutes with some care, and regret to find that neither of these interesting events is there recorded. We will just refer to two points which strike us as being of interest. The first is the well-known competition between Smith and Harris, as to who should supply the Temple organ. They seem to have been backed up by the Middle and Inner Temple respectively, and after a "tedious competition" in which both organs were put up in the church, and "played several Sundays one after the other" and finally "on the same Sunday alternatively on the same service," the question had to be referred to Lord Chancellor Jeffreys. He seems to have decided in favour of Smith, but we are glad to find that at his recommendation the defeated Harris got £200. It is also interesting to notice the articles of complaint exhibited by some barristers and students of the Middle Temple against the Benchers to Sir George Treby, Lord Chief Justice of the Common Pleas, and Sir Nicholas Lechmere, Baron of the Exchequer in 1694, and the Benchers' reply thereto. The decision of these judges was entirely in favour of the Benchers. One of the claims of the discontents was that "Gentlemen at the Bar jointly with the Bench ought to audit the public accounts."



*Encyclopædia of Forms and Precedents.* Vol. X. Patents to Public Health. Under the general Editorship of A. UNDERHILL, M.A., LL.D. London: Butterworth and Co. 1906.

About two-thirds of the present volume is taken up with the important subject of Public Health. This covers nearly 450 pages, and is divided into eleven sub-headings, many of which are again sub-divided. All the sub-headings, and many of the sub-sections have a preliminary note. Nearly 300 precedents are given which should prove of the greatest use to all concerned in the administration of the Public Health Acts. The sub-heading of greatest length is Sewerage, Drainage and Sanitation; and after that, Workmen's Dwellings and Lodgings, and Improvement Schemes. The contributors responsible for this subject are, Mr. S. G. Lushington, M.A., Mr. G. R. Hill, M.A., and Mr. J. Scholesfield. The next most important heading is Patents, which covers 173 pages and contains 67 precedents. For this, Mr. Vale Nicolas bears the sole responsibility, and contributes a very valuable preliminary note of about 50 pages, which, though it does not pretend to deal with the subject exhaustively, does, as he truly says, refer to "the most important matters and cases." Other short but not unimportant contributions are, on Pawnbrokers, Profit-sharing without Partnership, and Provident and other Societies. But it should be noticed that each of these two last only deal with part of a subject, the rest of which has been treated before. So anxious are the Editors to make their work as perfect as possible, that they even, in their Corrigenda, correct a mistake on page 497 which does not exist!

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*Select Cases in the Star Chamber, A.D. 1477-1509.* The Selden Society's Publications, Vol. 16. Edited by I. S. LEADAM. London: Bernard Quaritch.

Mr. Leadam contributes a long and learned introduction to this interesting volume. The first part of this discusses and reviews the history and practice of the Court of Star Chamber, dealing with many obscure and disputed questions. The conclusions he arrives at are summarised on page lxx, and go to show that the Court did not conceive itself as of statutory origin, nor its practice as limited by the statute "*Pro Camera Stellata*," but as a Court of the King's Council, and that the primary object of that Act was to obtain a statutory sanction for the powers it was assumed to possess. The second part consists of notes on the cases, which

are twenty-five in number, and which throw a most interesting light on the state of society of the time. For instance, the case of *Bathe, Prior of, v. St. Augustyn's, Canterbury, Abbot of*, besides raising a curious constitutional question, touches on interesting points as to the agricultural economy and financial administration of religious houses. *Powe v. Newman* illustrates the history of the ancient archiepiscopal Court of Audience, which was "the ecclesiastical counterpart of the King's Court of Requests." Several cases illustrate the lawlessness of the times, such as *Straunge v. Kenaston and Abbot of Eynesham v. Harecourt*, and Mr. Leadam gives a great deal of valuable information as to the efforts made by the Crown and Parliament to pass and enforce statutes against liveries, and maintenance and harbouring of felons. Another vexation, common in those times, which it was found most difficult to deal with, and the account of which is well worth reading, was the bringing of malicious indictments. The condition of religious houses on the eve of the Reformation is shown by the case of *Carter v. Abbot of Malmesbury*, which has additional interest in its bringing before us the incidents of a bondman's status. There are proceedings in *Attorney-General v. Parre* against a panel of jurors for perjury, the pleasant form in those days of a new trial. There is a group of interesting cases connected with towns, and we do not exaggerate when we say that every page of these notes contains matter of interest to the lawyer, historian and antiquarian.

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*The Yearly County Court Practice 1906.* By His Honour Judge WOODFALL, and E. H. TINDAL ATKINSON, assisted by G. W. JARDINE, I.L.B. Two vols. (in one). London: Butterworth & Co. 1906.

It is convenient to have a book, which is from the nature of its contents intended to be carried about from Court to Court, in one volume only; and the use of thin paper and care as to the type has enabled the publishers to unite both volumes of this work in not too bulky a form, although it contains, all told, not far from two thousand pages. The arrangement is, we think, the same as that of the last edition. The first volume concerns itself with General Jurisdiction and Jurisdiction in Admiralty, containing the County Court Acts, the Employers' Liability Act, the Admiralty Jurisdiction Acts, the Workmen's Compensation Acts, with Rules and Forms. The second deals with a variety of Acts conferring special jurisdiction upon County Courts. The only addition to these Acts that we have

noticed is the Shipowners' Negligence (Remedies) Act 1905. These Acts are conveniently arranged in five groups. The County Court Rules 1905 have now been incorporated, and some other alterations have been made, and we need scarcely say the notes on cases have been brought up to date. The Editors particularly call attention to the endeavours they have made, "especially in the chapters dealing with Employers and Workmen, to state the legal principles applicable in the very words of the judgments of the superior Courts." This, where it can be done, is very desirable, and a good example will be found in the quotation from the decision of the Master of the Rolls, in the case of *O'Brien v. Dobbie & Son*, dealing with the difficult question "when is a ladder a scaffold?"

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*International Law as interpreted during the Russo-Japanese War.*  
By F. E. SMITH, M.A., B.C.L., and N. W. SIBLEY, LL.M. London : William Clowes & Sons. 1905.

It may be said at once that this book brings together a variety of valuable details which it would be difficult indeed to unearth without a disproportionate expenditure of time and energy. *The Times*, *The Gazette*, and *The Annual Register* have been thoroughly sifted, and an accumulation of useful material is the result. The views of the Authors are generally marked by a spirit of great fairness and moderation, and little fault can be found with any of their pronouncements. At the same time, the book is too full of discursive digressions to be altogether satisfactory as a commentary on the late war; while its value, considered as a general treatise, is much reduced by the disproportionate attention which that conflict receives. And, difficult as we know it is to secure entire accuracy in references, we think that the *Ordonnance de la Marine* should not have been quoted in two different fashions on one page (180)—especially as neither reference enables us to identify the respective passages. The Authors state that the *Ordonnance de la Marine* of 1681 permitted privateers to destroy prizes in circumstances which "are not really distinguishable from those detailed by the Russian Code" of to-day. As a matter of fact, all that the ordinance says is, that privateers scuttling prizes with a view of concealing them incur a capital penalty; and that they must bring them into their home port unless compelled by enemies or tempest to release them somewhere else. Mr. Dupuis is indeed misled by Valin into thinking that destruction was a general rule; Valin says it is authorised by an

*Ordonnance* of 2nd December, 1693. This *Ordonnance* is in Lebeau<sup>1</sup> (I, 218)—but it is expressly limited to enemy ships, and could not be more decisively so. How this provision can be supposed to “empower a privateer to destroy a neutral,” as Messrs. Smith and Sibley assert, it is difficult to see.

*The Law of Parliamentary Elections and Election Petitions.* By HUGH FRASER, M.A., LL.D. London: Butterworth & Co. 1906.

**Third Edition.** *Ward's Practice at Elections.* By S. G. LUSHINGTON, M.A., B.C.L., assisted by F. J. COLTMAN. London: Butterworth & Co. 1906.

Without any disparagement of Mr. Lushington's work, Mr. Fraser's is the more important of the two. Its scope is wider, as it deals not only with Elections, but also Elections Petitions, as to the conduct of which it gives valuable information and advice. Mr. Fraser has also availed himself of the greater space he has been able to devote to his book to give more copious extracts from cases. Some of the extracts on spiritual intimidation are interesting reading (though fortunately instances of such intimidation are now rare), not the least, perhaps, on account of the racy language in which some of them are couched, as, for instance, Keogh, J., “If a single elector, the most miserable human that crawls about this town, had been refused the rites of the Churches in order to compel him to vote, or because he had voted, or because a member of his family had voted in a particular way, I would have avoided this election without the smallest hesitation.” Mr. Fraser lays down the law in some forty propositions, accompanied by explanatory notes and many verbatim extracts from Election judgments. Several Appendixes contain Statutes, Rules, etc., and Appendix V contains the case and judgment in *Woodward v. Sarsons*. It is so unusual to catch Mr. Fraser tripping that we are surprised to find Stipendiaries, Justices of the Peace and Receivers, put down without any qualification as ineligible for election!

Mr. Lushington may have been rather hurried in bringing out his edition in time for the general election, but we must do him the justice to say that, except for a couple of printer's errors in the Statutes in the Appendix, we have not noticed any signs of it. One of these, though only the substitution of a wrong letter, makes rather

<sup>1</sup> But, curiously, not in the *Recueil d'anciennes lois* (Paris, 1830), Vol. XX.

an important difference, as it turns the word "affecting," in the first section of the Corrupt and Illegal Practices Prevention Act 1895, into "effecting." There have not been many Acts nor many important decisions since the last edition, but those there are have been added. Mr. Lushington does his best to help us to understand what *Agency* at elections is, and how it differs from Common law agency, and gives a summary of decisions, but it remains a very difficult subject. There are some very useful tables and summaries, and all that can be done is done, to help candidates and their agents on the one hand, and returning officers on the other. One curious fact pointed out is, that by Bankruptcy in Ireland a person is not disqualified from being elected to the House of Commons, as he is if he is adjudged bankrupt in England or Scotland, although it does under certain circumstances cause a member to vacate his seat. Mr. Lushington does not consider it clear whether naturalized aliens are eligible for Parliament, but it is difficult to reconcile this doubt with the words "shall be entitled to all political and other rights, powers and privileges to which a natural-born subject is entitled," in the Naturalization Act 1870.

We have not been able to find in either work any statement as to the effect on an election of one of the candidates dying during the poll, or after it but before the declaration.

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*The Law of Compensation.* Two vols. By A. A. HUDSON, assisted by H. E. MILLER, W. A. PECK, and S. HUMPHRIES. London: The Estates Gazette.

When we first glanced at Mr. Hudson's new work the exclamation that rose instinctively to our lips was that of Dominie Sampson—"Prodigious!" Here is a treatise containing about 2,000 pages, referring to 2,662 cases, and containing the whole or parts of 98 statutes, and all relating to the statutory subject of the law of compensation and the taking of lands for public undertakings. There are other and good books on Compensation, but none that treat the subject so completely and exhaustively. The arrangement is rather a novel one, though Mr. Hudson has adopted it before in his book on Building and Engineering Contracts, and is as follows. The Author first gives a section of the Act he is dealing with, then states a rule or rules of law, and follows this with illustrations, consisting of short digests of each case from which such rules have been formulated, arranged in chronological order. Each of these

stages is distinguished by judicious variations of type. We may fairly call attention to the excellence and clearness of the type; no small matter in a law book. The work begins with a very useful introductory chapter giving practical hints of value on procedure, both before, and after the passing of the Act authorising the undertaking. Many are the pitfalls that beset the unwary who has not acquired and mastered Mr. Hudson's book. Nearly all the rest of the first volume is taken up with the Lands Clauses Consolidation Act 1845, and some Acts affecting the same. This Act is treated most fully and exhaustively, with an extraordinary wealth of illustration. The most valuable part of the second volume is, perhaps, that dealing with the Railway Acts, taking rather over 200 pages, and containing some ten Acts in whole or part. The most important of these is the Railway Clauses Consolidation Act 1845. The next division deals with subjects of increasing importance, namely, the Acts relating to Gas, Water, and Electric Lighting Undertakings. The Miscellaneous Clauses Acts comprise Acts relating to Cemeteries, Docks, Markets, Harbours, etc. Acts as to taking of lands for government purposes are divided according to whether they are required for naval and military purposes, or for civil purposes. Then come the numerous and varied Acts as to taking of lands by Local Authorities, including the Public Health Act 1875, Housing of the Working Classes Act 1890, and last of all Acts relating to sale to Private Landowners. When we add that the Appendixes contain over 120 Forms, the Lords Committee report on Betterment, two most instructive cases on Reinstatement, Bills of Costs, etc., we hope we have been able to give a slight idea of the scope of this important and valuable addition to the works on Compensation.

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*The Law of International Copyright.* By WILLIAM BRIGGS, LL.D., D.C.L. London: Stevens & Haynes. 1906.

This is, we believe, the first English work on the Law of International Copyright, and we are very glad to see so important a subject so thoroughly and exhaustively treated. We find the law of Copyright considered as it ought to be, as it has been, as it is in most of the countries of the world, alike by domestic legislation and International Convention, and as it is tending to be. All the references to our own Copyright Laws, and they are numerous, emphasise the necessity of codification. Another question, which we consider a pressing one,

is the importance of making absolutely correct the assurance given by Lord Salisbury in 1891 to the United States, that residence in the British Dominions was not a necessary condition for the acquisition of English Copyright by a foreigner. The consequence of the assurance was that the benefits of the American Chace Act of 1891 were extended to England. The advice of the law officers of the Crown, on which Lord Salisbury relied in giving his assurance, was based on the *dicta* of Lords Cairns and Westbury in the case of *Routledge v. Low*. If, as Mr. Briggs points out, an English Court should not follow these *dicta*, a serious question would arise with the United States. He further points out that the assurance is undoubtedly wrong as regards works of the fine arts, as shown by the Fine Arts Copyright Act 1862, and the case of *Giessendorfer v. Mendelssohn*. The work consists of five parts and an Appendix. The first Part is entitled "The Evolution of International Copyright," and deals with the nature and origin of Copyright, infringement, with many interesting details of piracy, and the progress in various countries towards protection of foreign works. It is interesting to note that the printer, not the author, was originally the recipient of the privilege, and that "the first recorded privilege granted direct to the author was given in 1491 by the State of Venice to Peter of Ravenna." Part II is headed "The Theory of International Copyright," and treats the political economy of Copyright (a subject of much interest), protection by means of treaties, prospects of a universal law of Copyright, and the position of alien authors in various countries. It is well to notice that American authors suffer from the national policy, but it is difficult to see how it "vitiates the education and tastes of the American youth," and "bars our people from the benefits of the good literature of England," as stated in a report quoted on page 98. Part III is the longest and most important part of the work, and is devoted, with the exception of a short chapter on the Montevideo Convention, to the history, principles, and provisions of the Berne Convention. It is remarkable that neither Austria, Russia, Greece, Holland nor Portugal, have acceded to the International Union. The cause is generally some difficulties connected with domestic legislation, such as have prevented Great Britain from adopting the Interpretative Declaration, because it conflicts with the English law in its limitations of "publication" to the issuing to the public in printed form, and forbids the unauthorised dramatisation of a novel. The absence of Turkey does not surprise us, nor the fact that progressive Japan

adhered to the Convention in 1899. We do not think that this nation will long allow itself to remain in the second class of contributors to the expenses of the office at Berne. The fourth Part is concerned with International Copyright in the British Dominions, and Colonial Copyright, with an additional section on the Rights of an Englishman in Foreign Countries. The last Part is short, and describes the protection of foreign authors in the United States. We find again here the argument that we before referred to, that the American law caused the debasement of its literature owing to the results of the reprint trade ; but the statements there do not quite agree with the complaints made by English authors of the injuries they have suffered. The Appendix of about 150 pages contains the text of Conventions, Treaties, Copyright Acts, &c. We have said enough, we think, to show how wide the scope of this work is, and its value to all who consider Copyright questions. The treatment throughout is full, with perhaps a little too much repetition ; but that may be unavoidable from its arrangement.

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*International Law.* Vol. II. War and Neutrality. By L. OPPENHEIM, LL.D. London : Longmans, Green & Co. 1906.

Professor Oppenheim's treatise affords a succinct conspectus, framed on highly scientific lines, of the field of the international law of war. The politician desirous of information will find it an easy work to consult on account of the clear way in which it is mapped out. It cannot be expected that in a work of this scale there should be any very full discussion of the arguments of prior writers. The Author, indeed, is more prone than we like to mistake isolated cases of illegality for conclusive evidence of the Law of Nations, and to take the fashions of the moment for permanent principles. His *dictum* that reprisals may extend to the territory of the offending State would, for instance, if generally accepted, lead to prompt anarchy ; it is supported only by the isolated, abnormal, and most questionable seizure by France of Mitylene. We cannot follow him in refusing to see in unilateral violence anything but a state of peace and amity. And his predilection for philosophical discussion leads him into occasional haziness of expression. Thus (p. 81) we are told that neutral territory is outside what he calls the "region of war" as a "matter of course," but that it *may* fall within it : and, again (p. 85), that half- and



part-sovereign States are not qualified to become belligerents, but, although not qualified to make war, they nevertheless can do so. This clearly recalls Robin in *Ruddigore*, who, when told that he could not forge his own will, triumphantly retorted that he *did*! The Author is, we think, inclined to give too much scope to the *droit d'angarie* and the so-called "right of self-preservation;" as also to the necessities of belligerent generals. At the same time Professor Oppenheim is always stimulating, even when least convincing. He has given great thought to the topic and has produced a creditable book, which in its business-like detachment from sentiment reminds us of Heffter. We have noted a few misprints—"van" Martens on p. 17, and "analogous" of contraband (p. xxxii, and throughout). A very useful reprint of conventions, etc., appears in the last seventy pages.

**Second Edition.** *The Law of Contract.* By M. R. EMANUEL, M.A., B.C.L. London: Jordan & Sons. 1906.

We do not quite understand why this is called a second edition, for although it is stated to be founded on Ullah and Colclough's *Manual of the Law of Contract*, it does not quite seem to be another edition of that work. There are many authoritative works on Contract, but we cannot call to mind a work for students which is quite up to date, and that this book is. It covers the ground clearly, and as far as we have been able to test it, as accurately as is possible in the space; and might be of use to others than students.

**Third Edition.** *A History of English Legal Institutions.* By A. T. CARTER, D.C.L. London: Butterworth & Co. 1906.

The fact that Dr. Carter's work has reached a third edition in seven years proves how indispensable it has become to students of the subject. In this edition the changes in substance and arrangement are slight, but are in the nature of improvements.

**Fourth Edition.** *Macqueen's Law of Husband and Wife.* By WYATT PAINE. London: Sweet & Maxwell. 1905.

Students of Mr. Paine's careful edition of this work will find that great improvement has been effected in the law of Husband and Wife by recent legislation, and by recent decisions alike. It is not many

years since the most colossal swindles were daily perpetrated under cover of the perplexities of which this branch of the law of England was only too full. Ecclesiastical subtleties, founded upon the notion that husband and wife were literally "one," lay at the foundation of these perplexities. The legislation regarding married women's property, and the Divorce Act, have done much to remedy these wrongs; but the subject is still full of traps for the unwary; and the student who, either in conveyancing or in the active work of litigation desires to be thoroughly *au fait* with these matters cannot do better than study Mr. Paine's work, beginning with the historical introduction and ending, chronologically speaking, with the important decision of the House of Lords in the case of *Morel v. The Earl and Countess of Westmoreland*. The chapter upon Practice, where the effect of *Scott v. Morley* and similar cases is considered, is especially to be commended.

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**Fourth Edition.** *Outlines of the Law of Torts.* By R. RINGWOOD, M.A. London: Stevens & Haynes. 1906.

This work is well known as an excellent book for students, and like many such books is often of great advantage to a practitioner by calling his attention to principles unobscured by the details of too many cases. To all alike we can recommend a careful perusal of the rules which the Author has formulated as deducible from *Allen v. Flood*, and *Quinn v. Leatham*. Much thought and ability must have been devoted to their construction, and it would be sad if any legislation now in the air were to render them useless. The Workmen's Compensation Acts are given at length, but the Author has wisely refrained from annotating them.

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**Fourth Edition.** *Private International Law.* By JOHN WESTLAKE, K.C., LL.D., assisted by A. F. TOPHAM, LL.M. London: Sweet & Maxwell. 1905.

The worst that we can say about Professor Westlake's book is that it is long overdue. Without under-valuing the work of other English labourers in the same field, it may safely be said that nothing approaches the volume now before us, as a comprehensive survey of the subject, informed throughout by a penetrative brilliance and grasp of principle more characteristic of foreign than of English legal literature. Much attention has been given since 1890, when the third edition appeared, to the two subjects of *Renvoi* and the proper law of Contracts. Judges have frequently insisted, in England,

on the paramount importance of the intention of the parties in matters of contract, almost as though that intention by some magical and inherent validity transcended all national laws ; and have tried to find in it an implied choice of some particular law, in those cases where none is expressed. When we consider that it is by reference to some national law that the intention becomes clothed with the force of a legally binding contract at all, the ascription of any such independent virtue to the mere intention of the parties is visibly preposterous. Professor Westlake maintains the correct position, in the face of such cases as *Hamlyn v. Talisker Distillery*. He points out that it is one thing to uphold the validity of a clause by invoking the intention of the parties to apply a particular law, and quite another thing to invoke that intention when the result of its application would be to deny validity, in whole or part, to their contract. It is by no means certain that the English Courts would show themselves enamoured of the doctrine of Intention in the latter case. The supposed principle thus resolves into something very like the maxim "*res magis valeat quam pereat*." Exactly the same argument is employed by Dr. Pawley Bate in his recent able discussion of the English cases which appear to support the doctrine of *Renvoi*:<sup>1</sup> it is scarcely possible to believe that these would all have been decided in the way they were, if the effect would have been to invalidate, instead of to uphold, the juristic acts which were in dispute. In this matter of *Renvoi* (which has never been adequately discussed by an English Court and was dismissed in a short paragraph of the third edition of the work now under review), Professor Westlake attaches less importance to that argument, which would discount the force of the English cases ; and he justifies his reception of the doctrine of *Renvoi* on the theory that the national legislator must be supposed deliberately to leave gaps in his legislation for foreign legislators to fill up. We may condense, but we think we do not misrepresent, his argument in an illustration. The law of England must be taken, in his view, to declare simply that "for persons domiciled in England, majority is attained at 21"—so that if a foreign court desires to know the English law as to the majority of a person not domiciled in England, but of British nationality, it can discover no rule, and must apply its own. It seems to us that the content of English law is wider than this, and that English law does supply rules for the ascertainment of the majority of all

<sup>1</sup> *L. M. & R.*, No. 336, 1905, p. 371.

persons whatsoever. Normal English law fixes it at 21. English law, plus its rules of comity, fixes it at 21 or the age adopted in the place of domicile, as the case may be. But in no aspect does English private law consciously or unconsciously disclaim all connection with persons domiciled out of England. Professor Westlake develops in the historical chapters (entirely recast) a conception of Private International law which we cannot but think confuses the subject with Public International law. We are invited to consider Europe as divided into communities, united by the tie, formerly of common domicile, and now generally of common nationality, and to concede that for the members of each community the law of that community is, in private matters, internationally supreme. It seems to us that this is to substitute for the clear-cut fact of territorial independence an hypothesis of hazy speculation. History was made for man, not man for history. At the present day, a Belgian domiciled in Denmark is dealt with under Belgian or Danish law abroad, not because domiciled Danes, or Belgian citizens, have a common consciousness of law, which internationally exempts them from the scope of any other private law—but because the sovereign of the foreign country, who is internationally supreme there, chooses to extend to him a reasonable *temperamentum* based on his unlikeness to the ordinary citizen. Unless we keep territorial jurisdictions separate, and recognise that Private International law means, for each country, nothing but its own view of the proper course to take in cases of conflict, we shall have to develop a science to tell us how to resolve conflicts of rules for the resolution of conflicts. We notice, in fact, that States which admit the supremacy of the private law of the nationality, are extremely apt to evade its application in practice by the simple expedient of calling it public. The exception of "*ordre public*," or "public policy," is always at hand to dispense the territorial State from the consequences of its rash acts. The consequent incertitude is in every way to be deprecated, and the doctrine of Professor Westlake would tend to extend it. It need only be added that the results flowing from *Le Mesurier v. Le Mesurier*, *Ross v. Winans*, *Cooke v. C. A. Vogeler & Co.*, and other recent cases, are treated with felicity and insight. ("Walton," at p. 88, should be "Watson.") Mr. Topham is associated with Dr. Westlake in the preparation of the present edition, which, we repeat, is invaluable to the English reader.

**Fourth Edition.** *Clerk and Lindsell on Torts.* By WYATT PAINE. London: Sweet & Maxwell. 1906.

Mr. Paine, who edited the third edition of this work, has not taken long in bringing out this new one, in fact, only about eighteen months. We have no doubt there are satisfactory reasons for this course, and, although the only new statutes of importance that he has been able to add are the Trade Marks Act 1905, and the Railway Fires Act 1905, yet there has been a considerable number of important decisions to record. The Trade Marks Act is of considerable importance and is treated at some length. It will be noticed that the learned Editor expresses himself cautiously in considering the point, whether an action for damages will lie for innocent infringement, and does not go further than saying, "The Act of 1905, however, tends to remove this uncertainty," and further on "it does not seem a necessary consequence, apart from the obvious trend of recent legislation, that an infringement should be treated on the same principle as a trespass to land or goods." The Railway Fires Act is in the unusual position of not coming into operation for more than two years after it was passed; we suppose to allow time for alteration of engines. Among the recent cases included in this edition may be noticed *Kine v. Jolly* and *Higgins v. Betts*, which both deal with the question of a mandatory injunction for an obstruction to ancient lights. *The Attorney-General and Monmouth County Council v. Scott*, *Chichester Corporation v. Foster*, and *Kent County Council v. Folkestone Corporation*, deal with the duties and obligations of local authorities in the repair of roads and injuries to the same from extraordinary traffic. *Scarborough v. Cosgrove* is an important case on the liability of boarding-house keepers for the loss of their guests' property. *Frost v. Aylesbury Dairy Co.*, and *Chapronier v. Mason* are both interesting, as illustrating the liability of the person who supplies goods for injury caused by the supply of an improper article. Some alterations have been made by absorbing foot-notes into the text, and the work quite maintains the high reputation reached by the former editions as being quite one of the best works on its subject.

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**Sixth Edition.** *English Constitutional History.* By T. P. TASWELL-LANGMEAD, with Notes by P. A. ASHWORTH. London: Stevens & Haynes. 1905.

Mr. Taswell-Langmead's *Constitutional History* was primarily intended as a text-book for students at the Universities and Inns of

Court, and has achieved great and deserved success in that aim. It, however, also appeals to a much larger public, and we think that no man who takes a serious and intelligent interest in public affairs would ever regret adding it to his library. Its treatment of many subjects, of course, is not, nor does it pretend to be, exhaustive, but in such cases it gives references which enable the reader to obtain further information for himself. Mr. Ashworth, who is responsible for the present edition, as he was for the fifth, has, besides adding a short section reviewing the more recent development of the Constitution, "cut away" much of the historical footnotes and added to them much valuable matter culled from the works of such recent and eminent writers on the English Constitution as Professor von Gneist, Mr. Hannis Taylor, Mr. L. O. Pike, and others. Mr. Ashworth defends the work against the strictures of foreign constitutional lawyers "who complain that the book gives insufficient information on the English *administrative system*," and replies "that such a *system*, as it obtains in France and Germany, does not *separately* exist in England." We should like to call attention to some of the additions to the notes. There is a useful amplification to that on Wager of Battle referring to the case of *Ashford v. Thornton*, and stating that probably the last case in which it was employed was that of *King v. Williams*. There is an interesting note on the treatment of the Jews in England under John and Henry III, and a note on the Curia Regis referring to the opinions of Mr. Bigelow, Professor von Gneist and Mr. Pike, on that very disputed subject. We notice a valuable note on life Peerages, which raises the curious point whether Lords of Appeal or Bishops would, for criminal offences, be triable by their peers, and assumes it in the negative on the ground that they are not ennobled in blood. Other notes worth referring to are those on "free municipalities"; on the differences of opinion between the author and Professor von Gneist on progress during the Tudor dynasty; on the English Reformation; censorship of the Press; and the independence of the Judges. The Editor's addition to the Author's long and valuable note on "Treason" is interesting, as it suggests that Dr. Jameson and his "freebooters" might have been tried for treason "committed against her British Majesty as suzerain of the Transvaal Republic." The same note contains one of the very few mistakes we have noticed in our perusal of these pages: in referring to *Rex v. Krause* it is stated that "the defendant was convicted of the Common law

offence of soliciting another to murder an enemy in time of war." This sentence is rather misleading, as it tends to suggest that there being a state of war had something to do with the offence, but the counts charging the soliciting to murder were withdrawn from the jury by the Lord Chief Justice, and the defendant was convicted of attempting to solicit, etc.

Messrs. Stevens & Haynes have also published an analysis of this History by Mr. A. M. Wilshire, LL.B., which should be useful for those who have to *memorise* the book for examination purposes.

**Thirty-eighth Edition.** *Stone's Justices' Manual.* Edited by J. R. ROBERTS. London: Butterworth & Co. 1906.

The most remarkable feature of the 1906 edition of this invaluable work is the Index. This very important part of a law book has been much enlarged and improved, and now covers over a hundred pages. Attention is particularly drawn in the preface to the cases decided on the Licensing Act 1904, and the opinion is expressed that the Act "has been a fruitful source of litigation, of which the last has not yet been heard." In connection with this subject, we may call attention to the important Memorandum issued by the Commissioners of Inland Revenue given in the appendix. In this the Commissioners explain the principles on which they have proceeded in determining the amounts of compensation payable on non-renewal of licences under the Licensing Act 1904. It is worth noting that the Commissioners refer to a passage in the judgment of Mr. Justice Channell, in *Bradford-on-Avon Assessment Committee v. White* "as embodying the general principle on which they should themselves act in appraising the effect on the price of licensed houses of the competition of brewers for them." We have found, in the proper places, any recent cases on criminal law to which we referred, and the only criticism we have to make is that in treating the Falsification of Accounts Act 1875, the reference to *R. v. Palin* should be attached to the words "any document or account" towards the end of section (1).

*The Law of Repairs and Improvements including Ecclesiastical Dilapidations.* By J. H. JACKSON, M.A. London: Butterworth & Co. 1905.—There are many books in which these subjects are discussed, so far as they relate to the subject-matter of those books; but we know of no treatise exactly upon the present lines. The idea is a good one; and it appears to have been carefully followed out. The chapter on "works affecting the public health" is especially valuable.

*A Guide to Students' Law Books and to both Branches of the Legal Profession.* By J. S. DUCKERS. London: Sweet & Maxwell. 1906.—A volume of this sort is most valuable for students: a law library is absolutely bewildering to the novice: and an index of suitable books is necessary. Although the books are not in all cases those which we should ourselves have chosen, we recognise that such a choice is a matter of opinion: and the Author's selection is a hundred times more useful than any which a student could make for himself.

*A Manual of the Law of Principal and Agent.* By J. B. PORTER. London: Stevens & Haynes. 1905.—In the Preface Mr. Porter disclaims any attempt to deal exhaustively with any branch of this large subject, his aim being to produce a brief manual for ordinary use. We rather question whether such a manual is needed; but the book appears to be competently written and may be found useful. A fair number of recent cases are included by the Author, amongst which we note *Morel v. Earl of Westmoreland* (L. R. [1904], A. C. 36, 37), which decided that the fact of husband and wife living together, and the fact that necessaries are supplied on the wife's orders, are not evidence that they are jointly liable if the husband has made the wife a sufficient allowance; even though this may not be known to the creditor. We should have expected to find the heading "Election" in the Index of a book of this kind.

*Students' Precedents in Conveyancing. Third Edition.* By J. W. CLARK, M.A. London: Sweet & Maxwell. 1905.—The Author's task here was to select from an *embarras de richesses* what was suitable for his purpose: for as he frankly observes, the forms themselves are borrowed from received authorities. But it is no easy work to make a short collection: the greater the brevity the greater the labour in such a case; and judged upon this principle, Mr. Clark's industry has been enormous and his success is proportionate. There is neither too much nor too little. The common forms required by a student are here, with just sufficient additions from precedents of earlier days to make the study of conveyancing law—which is necessarily to some extent a historical study—intelligible. The student will find great assistance from its pages: and, if he read it with Sir H. Elphinstone's *Introduction to Conveyancing*, his study should be a profitable one both for himself and for his future clients. The whole study of conveyancing must now, of course, be made in the light of the Land Transfer Acts. Two forms from the Land Transfer Rules 1903 are to be found in the work before us, and if the introductory chapters of Brickdale and Sheldon's work be studied with these, the reader will soon be ready to enter upon a practical application of his art.

*The English and Indian Law of Torts. Third Edition.* By R. RANCHODDAS, LL.B., and D. K. THAKOR. Bombay: The Bombay Law Reporter



Office. 1905.—There are doubtless many besides students to whom a comparative study of two legal systems, such as that before us, may be of use; and some evidence is afforded of this by the fact that less than a year elapsed between the publication of the second and third editions. We may congratulate the Indian Authors on the able manner in which they have handled their theme. The first nine chapters are designed to present a groundwork of the whole subject. The tenth sets forth the classification of specific wrongs, which are then treated separately in the ensuing chapters. The last chapter is devoted to Torts founded on Contract. All the recent decisions appear to be included, and altogether the book may be thoroughly recommended.

*Melshimer and Gardner's Law and Customs of the Stock Exchange.* **Fourth Edition.** By W. BOWSTEAD. London: Sweet & Maxwell. 1905.—This excellent book, of which the last edition appeared in 1891, has been thoroughly revised by Mr. Bowstead. A large number of cases, including all the recent decisions, have been added; and we may recommend the practice which has been adopted of giving the reference of each case in the Table of Cases. We consider that this should be done in every text-book. An interesting little history of the Stock Exchange is given in the opening chapter. The business of stock-broking and jobbing was, we are told, conducted "at the end of the last century" (Mr. Bowstead might correct this slip in his next edition) both at the Rotunda of the Bank of England and at the Stock Exchange Coffee House in Threadneedle Street, where there was an entrance fee of 6d. The rooms were even then known as "the House." The modern Stock Exchange dates from 1802, owing its foundation to a Mr. William Hammond and others; its members then numbered five hundred. A succinct account is given of the method of carrying on business. It would be of interest to the layman to know how far the rule is observed, which provides that a broker asking a jobber to "make a price" is not to mention whether his instructions are to buy or to sell. We have been led to understand that the "marking down" of prices is often due to knowledge on the part of jobbers that a broker is anxious to sell a particular stock. The book under review is well and clearly written, and deals with its subject very thoroughly.

*The Law of Arbitration and Awards.* **Fourth Edition.** By J. SLATER. London: Stevens & Haynes. 1905.—This little book is "primarily" intended for the use of commercial men. After referring to the establishment in various parts of the country of Courts of arbitration for the purpose of settling disputes, the Author considers it "desirable to put in a concise and readable form the principal features of this subject, so as to enable all the parties to an arbitration to form some idea of the duties and responsibilities of their position, as well as the advantages they may hope to obtain from this mode of arriving at a settlement." However, we think it evident that the work is also meant for the use of the profession from the citation of cases, and some discussions of details that would be useless to laymen. The work is well adapted for its purpose, being well arranged, and concise without being too much so, and as far as we have been able to test it we have found it accurate. It contains an appendix of Statutes relating to Arbitration, and some Forms.

## CONTEMPORARY FOREIGN LITERATURE.

*Der Nachweis von Schriftfälschungen, Blut, Sperma, Usw.* By Prof. Dr. M. DENNSTEDT and Dr. F. VOIGTLÄNDER. Brunswick, 1906.

A work on expert evidence, chiefly dealing with chemical tests for forgery and bloodstains. It contains careful coloured photographs of the spectrum analysis of different kinds of blood.

*Das bürgerliche Recht Englands.* Codification by EDWARD JENKS, B.C.L., and others. Commentary by Dr. G. SCHIRRMAYER. Berlin, 1906.

This is a continuation of a work, the early part of which has been noticed in the *Law Magazine and Review*. The present part deals with natural and juristic persons, with things and with legal capacity. The English is generally correct where it occurs, but now and again errors are to be found, no doubt attributable to the printer.

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*Der Tatbestand der Piraterie.* By Dr. P. STIEL. Leipsic, 1905.

This is an interesting and exhaustive study of the international and municipal law against piracy, from Dig. xlvii, 8, downwards. With slight differences the law is general and the *hostis humani generis* has now little chance of evading the scaffold in any civilised country. The book is one of a series, the *Staats—und völkerrechtliche Abhandlungen*. It appears to be one of the best modern compilations of German legal erudition.

*De Legatis et Legationibus Tractatus Varii.* By VLADIMIR E. HRABAR, Professor in the University of Dorpat. Dorpat, 1905.

Russia, in spite of her troubles, still produces literature. It was a good idea of Professor Hrabar to set forth sometimes the whole text, sometimes an abstract, of all the writers before Grotius who treated of embassies. One is surprised to find how numerous they are, forty-six in all. The earliest is of the thirteenth century, Durandus

the *Speculator*, named in Dante's Epistles, the latest is Joannes a Chokier, whose *Tractatus de Legato* was published at Cologne in 1624. The names most familiar in England are those of Etienne Dolet, Torquato Tasso (*Il Messaggero*, Venice, 1512), and Albericus Gentilis. Professor Hrabar is to be congratulated on a most useful compilation.

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*Il Comunismo Giuridico del Fichte.* By G. DEL VECCHIO. Rome, 1905.

An examination of Fichte's *Der geschlossene Handelsstaat*, reprinted from the *Rivista Italiana di Sociologia*.

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*Rivista della Giurisprudenza Commerciale Straniera. A proposito della Natura Giuridica del Servizio di Cassette di Sicurezza nelle Banche.* By MARIO SARFATTI. Milan, 1905.

As readers of the *Law Magazine and Review* know, Signor Sarfatti is adequately equipped with knowledge of English law, as is shown in many places in these two reprints of contributions to periodicals, the former from the *Rivista di Diritto Commerciale*, the latter from *Il Filangieri*. The learned Author should not, however, write of "lessor" and "lessee." For the benefit of English readers it may be stated that *cassette de sicurezza* means safe deposits.

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## PERIODICALS.

*Journal du Droit International Privé.* 1905, Nos. XI, XII, 1906, Nos. I, II.

Several decisions of importance are reported, and the last number of 1905 contains the usual bibliography of the year's output of books and articles on Private International law. In the case of *Jowitt v. Cunliffe Russell & Co.* the Tribunal of the Seine determined the construction of a gambling contract made at Paris between English parties, the question being one of public order (p. 1247). In *Kann v. Martin du Gard* the same Court held that where a French citizen had been naturalised in England, the *conseil judiciaire* to which he

had been subject in France became ineffectual, and he acquired the right to deal himself with securities deposited at the bank by his *conseil* (p. 145). A long account is given of the proceedings at the Atmejdin in Constantinople against the Belgian Joris, accused of complicity in the attempt on the life of the Sultan in July, 1905. The article is well worth reading as a graphic account of the seeking after justice in Ottoman tribunals (p. 264).

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*Zeitschrift für Internationales Privat—und Öffentliches Recht.* XV, Part 6 ; XVI, Part 1. Leipsic, 1905, 1906.

This contains no English law, but Dr. Fuld deals with American copyright. There is a commentary on the Russian commercial code by Rechtsanwalt Klibanski, of Berlin. The judicial ordinance for Eritrea (p. 102) is an interesting example of Italian colonial government. A useful bibliography, similar to that in the *Journal du Droit International Privé*, is appended.

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*Deutsche Juristen-Zeitung.* 15 Dec., 1905—15 March, 1906. Berlin.

This well-known fortnightly publication contains portraits of the jurists, now dead, who have contributed to it since 1896. Of these Pernice and Mommsen are the most familiar names in England. It also contains the usual summary of decisions on the Bürgerliches Gesetzbuch. At p. 1154 much juristic wrath is outpoured on the socialistic amendments of the law in Bavaria and Saxony, by which the offices of *Schöffe* and *Geschworene* are thrown open to tradesmen and artisans. English readers will be reminded of a parallel in a recent Bill to lower the qualification of county magistrates.

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*La Giustizia Penale.* 4 Jan.—15 March. Rome.

This periodical contains the usual well-compiled digest of decisions, but in these numbers there is nothing of special interest to English lawyers. In the index the headnotes of the cases of 1905 are arranged in illustration of the sections of the Penal Code and the Penal Procedure Code.

JAMES WILLIAMS.

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## WORK OF REFERENCE.

*Debrett's House of Commons and the Judicial Bench.* London: Dean & Son.—The recent General Election, resulting as it did in the return of some 320 new Members to Parliament; and the numerous resignation and appointment honours consequent upon the change of government in December last, have necessitated an entirely new volume of this work, and although the publishers issued the book within four weeks of the announcement of the last polling, we do not find that they have in any way sacrificed detail or accuracy in their effort to place the book before the public at the earliest possible date; indeed, so far as we have tested it, we have found the information in every case full and satisfactory. It is interesting to note that in the present Parliament the legal element is again very pronounced, 150 M.P.'s. or over 20 per cent. of the whole House, being members of the Bar or solicitors. A section dealing with Sheriffs-Substitute of Scotland is a new feature of the present volume.

Books received, reviews of which have been held over owing to pressure on space:—Wilshire's *Elements of Criminal Law and Procedure*; Mews' *Annual Digest*; Matthews' *Law of Money-Lending*; Livesey's *Manual of Licensing Applications*; Hill's *Yearly Digest*; Bunyon's *Law of Fire Insurance*; Roughcad's *Trial of Dr. Pritchard*; Maine's *Ancient Law, with Notes by Sir F. Pollock*; Terrell on *Patents*; Norton's *Treatise on Deeds*; *The Arbitrator in Council*; Highmore's *Customs Laws*; Williams' *Vendor and Purchaser, Vol. II.*; Freeman and Abbott's *A.B.C. of Parliamentary Procedure*; Taylor on *Evidence*; Underhill's *Law of Partnership*; Benjamin on *Sale*; Atlay's *The Victorian Chancellors*; Leake's *Roman Private Law*; Allen's *Law of Corporate Executors*; Freeman's *Guide to Statute Law against Drunkenness*; Leake on *Contracts*; Gooden's *Modern Law of Real Property*.

Other publications received:—Transactions of the Medico-Legal Society, Vol. II; Kneec's *Inequalities of English Law*; *Disestablishment*, by the Rev. G. C. HUTTON; *Index of Law Additions, New York State Library* (New York State Education Dept.); Draper's *Trade Unions and the Law* (Stevens & Sons); *Cultura Espanola, Part I, The Law Clerk, No. 1*; *Criminal Statistics 1904*.

The *Law Magazine and Review* receives or exchanges with the following amongst other publications:—*Juridical Review*, *Law Times*, *Law Journal*, *Justice of the Peace*, *Law Quarterly Review*, *Irish Law Times*, *Australian Law Times*, *Speaker*, *Canada Law Journal*, *Canada Law Times*, *Chicago Legal News*, *American Law Review*, *American Law Register*, *Harvard Law Review*, *Case and Comment*, *Green Bag*, *Madras Law Journal*, *Calcutta Weekly Notes*, *Law Notes*, *Law Students' Journal*, *Bombay Law Reporter*, *Medico-Legal Journal*, *Indian Review*, *Kathiawar Law Reports*, *The Lawyer (India)*, *South African Law Journal*.

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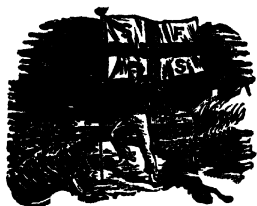
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EDITED BY

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### **C O N T E N T S.**

NOTES: State Divorce decrees and the Constitution of the United States; Effect of domicile on jurisdiction to dissolve marriage; Contracts of unregistered money-lenders; Cases on company winding-up and reconstruction; Power to alter club rules; Copyright in photographs; The Court of Piepowder, &c.

**THE KATHIAWAR JURISDICTION CASES.** By **Sir A. C. LYALL, K.C.B., G.C.I.E.**

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**THE CONSEQUENCES OF A TRUSTEE'S FAILURE TO CONVERT AS BETWEEN TENANT FOR LIFE AND REMAINDERMAN.** By **WALTER G. HART.**

**THE BASIS OF CASE-LAW.** By **A. H. F. LEFROY.**

**THE MARSHALLING OF MORTGAGES.** By **W. STRACHAN.**

**JEREMY BENTHAM.** By **H. J. RANDALL, Jun.**

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*N.B. —The attention of Legal Advisers settling Testamentary Dispositions and of Trustees, Executors and others having money for distribution is drawn to the Directory of Charitable and Philanthropic Institutions following last page of literary matter.*

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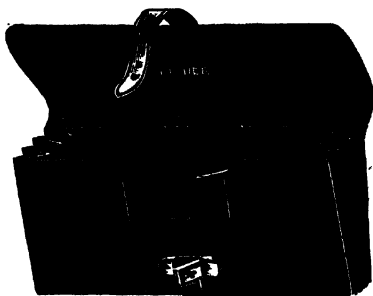
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# THE LAW MAGAZINE AND REVIEW.

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No. CCCXLI.—AUGUST, 1906.

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## I.—THE INFLUENCE OF CHRISTIANITY UPON THE LAW OF ROME.

THE Public Law Class Room of the University of Edinburgh is a somewhat bare apartment, but it contains at least one embellishment—a statue of Socrates: under which, if I remember rightly, are inscribed the following words of Lord Mansfield: “I will take the liberty of calling him the great lawyer of antiquity, since the first principles of all law are derived from his philosophy.”

It is elementary to observe that the Romans were not a philosophical people like the Greeks, but were essentially practical. In the department of philosophy, they can make no claim to originality; their function was rather that of reproduction and application. They imbibed and applied the philosophical thought of their more speculative neighbours. Hence much of their philosophy, such as it is, is of an eclectic character.

If the philosophy of Socrates did not directly influence the Civil law of Rome, the influence of his successor Zeno made a deep impression upon later Roman jurisprudence.

Indeed it would appear to be to Stoicism, rather than to Christianity, that must be attributed that ameliorating influence which manifests itself in the history of Roman



law. The doctrine of the *Jus Naturale*—a doctrine which Stoicism made peculiarly its own—as it became gradually incorporated with the *Jus Civile*, was one of the main factors in the amelioration of the latter, and only in so far as Stoicism was influenced by Christianity (e.g., the effect upon Seneca of his contemporary St. Paul) can Christianity, in its early years at least, be said to have had any influence upon the law of Rome.

“Christianity,” says Professor Flint, “is often represented as having exclusively originated and promulgated truths which were intellectually at least, undoubtedly recognised in Pagan Rome. That men are not merely citizens, that every man is debtor to every other, that they have a common nature, and in consequence reciprocal rights and obligations, were well-known truths in the time of Cicero, and commonplaces in the time of even the earlier Emperors.”

It was not until Christianity had become the established religion of the Empire, that we see evidence of changes directly attributable to its influence. “While the Roman Empire,” says Gibbon, “was undermined by slow decay, a pure and humble religion gently insinuated itself in the minds of men, grew up in silence and obscurity, derived new vigour from opposition, and finally erected the triumphant banner of the Cross on the ruins of the Capitol.” Indeed the position of Christianity in the eye of the law was in itself sufficient to prevent its exercising an influence on the Civil law. The Church, as it were, went underground. It is true the Roman law was exceedingly tolerant of diverse religions. As country after country fell before the victorious arms of Rome, she incorporated the gods of the conquered nations among her own. But in the prevailing toleration, as Bishop Lightfoot has pointed out, there was one notable exception: there was no toleration for Christianity. Even the position of the

Jews Rome could appreciate to some extent. If they had no image of their God, at all events they had a magnificent temple, and an ornate ritual. The early Christians had none of those things. Their position was unintelligible to the Roman world. The Roman religion was political; it was bound up with the State; it culminated in the apotheosis of the Emperor; it required the performance of certain overt acts, and herein lay the difficulty of the Christians. The disciples of Christ could not, consistently with their profession, give the honour which was due to God alone, to a man, and that one such a man as the blood-thirsty madman, the Emperor Nero, and others who disgraced the Imperial purple. Consequently they were branded as atheists. Pliny, a conscientious Roman magistrate, was puzzled to know how to deal with them. In his famous letter to the Emperor, he refers to their religion as "*prava et immodica superstitio*," and Trajan replied: "*Si deferantur et arguantur puniendi sunt*." If they are charged and convicted they must be punished. Even to a historian of such fame as Tacitus, the Christian religion was "*exitiabilis superstitio*." "The Roman statesman," it has been said, "saw in the Christian Church either the ephemeral product of fanatical folly and delusion, or a slinking gang of conspirators, '*lucifuga natio*,' which the State must needs put down, were it only for its own safety."

While the Roman law was tolerant in the matter of religion, it was jealous of what it considered foreign superstitions, and perhaps it was this feeling which explains the attitude of some of the best of the Roman Emperors towards Christianity. Those who were imbued with the feelings of the old Romans relentlessly opposed it, while others were more tolerant. Marcus Aurelius, therefore, is found among the persecutors. While on the other hand those Emperors who were themselves foreigners, did not view Christianity with the same aversion.

But, in short, Christianity for fully two centuries was a *religio illicita* proscribed by the State, and, as such, was precluded from exercising a direct influence on Roman law.

"The teaching of Seneca," says Muirhead, "did far more  
 " to influence Roman law than the lessons that were taught  
 " in the little assemblies of the early converts. It would be  
 " a bold thing to say that had Christianity never gained  
 " its predominance, that spirit of natural right would not  
 " have continued to animate the course of legislation, and  
 " to evoke as years progressed most of those amendments  
 " in the law of the family and the law of succession  
 " that were among the most valuable of the Imperial con-  
 " tributions to Private law. Not until Christian belief had  
 " been publicly sanctioned by Constantine, and by Theo-  
 " dosius declared to be the religion of the State, do we  
 " meet with incontestable records of its influence."

Roman law, originally the old *Jus Civile*, was the law which obtained among Roman citizens. Its scope was limited not merely to the City on the banks of the Tiber and its possessions, but to those of its inhabitants who enjoyed the rights of Roman citizenship; other inhabitants of the City, such as *plebeians* and *peregrines* (or strangers), were outside its pale. It existed for the patrician alone. He only could contract the highest form of marriage, *confarreatio*, and acquire property, *ex jure Quiritium*, i.e., on legal title. *Iustæ sunt nuptiæ quas cives Romani contrahunt*: Lawful marriage is that which Roman citizens contract.

It was not until 310 A.U.C. (i.e., about 443 B.C.), that marriage between patricians and plebeians was authorised, and then it was not *confarreatio*, but *coemptio*, an inferior kind based on the analogy of sale.

Again, the property of the early warriors of Rome, their lands, houses, cattle, and slaves, could only be transferred legally by certain *voces signatæ*, or words of style. In theory the State had paramount right over the citizen, and was

witness of the transaction. The Romans were formalists. As Rome extended her boundaries, this state of things could not continue. The result would have been practically to put much of her property *extra commercium*. Commercial law, then, was one of the factors which helped to break the rigidity of the *jus civile*.

In the year 242 A.U.C. (i.e., about 511 B.C.), a magistrate, called the Prætor Peregrinus, was appointed to settle questions between Roman citizens and aliens, and between aliens themselves, *jus inter peregrinos plerumque dicere*. The rules evolved by him were the beginning of what is called the *jus gentium*, or law of nations. It does not correspond to modern International law. It was rather a system of Equity which grew up beside the strict Civil law of Rome, and in process of time was gradually incorporated with that law. "*Jus Prætorium est quod prætores introduxerunt adjuvandi, vel supplendi vel corrigendi juris civilis gratia propter utilitatem publicam.*" The Prætorian law is what the prætors introduced for the sake of assisting or supplementing or correcting the Civil law, on account of public utility. For example: it countenanced the natural rights of a parent who was *non civis*, though it could not confer the *patria potestas*. Again as regards property, it recognised a sort of property in the *non civis*, the *possessio bonorum*, though not the *dominium* or full right of property enjoyed by the Roman citizen.

It was the custom for the prætor at the commencement of his year of office to intimate what rules he intended to apply in certain contingencies. These were exhibited on his *Album* (as the white boards in the forum were called) and consisted generally of the rules of his predecessors with certain additions of his own. In the reign of Hadrian, the edict ceased to be increased by annual additions, and was amended and consolidated by the Juris-Consult Julian. After this, the "Equity" jurisprudence of Rome was evolved

by a series of jurists from Hadrian to Alexander. This was the classical period of Roman jurisprudence, adorned by the great names of Papinian, Paul, Ulpian, Marcian, and Modestine.

The *jus gentium* had been built up by the contact between Romans and non-Romans, but both before and after the consolidation of the Prætorian Edict, the Civil law of Rome was modified by an influence emanating from an altogether different source. This was the Natural law of the Greek, and especially of the Stoic philosophers. The conception of a law of nature to which men ought to conform, something above and beyond all positive law, adapted itself to the Roman mind, and found able exponents in such men as Cicero and Seneca. "There is," says the former, "a true law, a right reason conformable to justice, diffused through all hearts, unchangeable, eternal, which by its commands summons to duty, by its prohibitions deters from evil. Attempts to amend this law are impious, to modify it in any respect is wrong, to repeal it is impossible. From this law neither Senate nor People can relieve us, and it shall not be one law at Rome, and another at Athens, one now and another hereafter. But the one eternal and immutable law shall sway all nations for all time and be the common law and master of all."

It was this conception, then, which the later Roman lawyers, practical men of affairs, took from the philosophers and applied practically in the Forum. The Prætor had not had much scope in the matter of philosophical speculation. The jurists were not similarly hampered. At first it was the *pontifices* who were the sole legal advisers of the King and the magistrates, but with the extension of juristic learning, others gradually came to give opinions as well. This fact, however, had the effect of lessening the respect in which such *responsa* had been held hitherto, until Augustus, with the view of restoring them to confidence,

and perhaps (as has been suggested), with a view to increasing his own imperial power, conferred on certain distinguished jurists the privilege of giving *responsa ex auctoritate principis*, i.e., with the authority of the Emperor. From the time of Tiberius such opinions were made binding on the judges, e.g., a litigant having got an opinion, could produce it to the judge who was bound to decide according to its terms, unless the other side could produce an opinion from another patented jurist, in which case he might use his own discretion. At first such opinions or *responsa* were only binding in the particular case with reference to which they were given, but by degrees they came to have greater effect, and to be binding in subsequent cases. Thus they formed precedents and constituted a body of case law analogous to the reported decisions of the Law Courts of to-day.

It is in a great measure to the influence of such men as Papinian, Paul, and Ulpian, that Roman law owes its commanding position as the most magnificent system of jurisprudence ever given to the World. Even now, it forms possibly the basis of most European systems of law; and why is this? Is it not because such men as these evolved and applied principles which are applicable for all time, and amid the most various conditions of mankind. "Philosophers," it has been said, "in the sphere of law, searchers after ultimate truth, they were able at the same time to apply in the concrete what they had found, and to give it the force of law." The empirical methods of tinkering the *jus civile* gave way to a scientific system. "That which is always equitable and good is called law: such is the *jus naturale*," says Paul. The words of Ulpian show to what high dignity he considered the lawyer was called. "They call us priests of justice," he says, "for we cultivate justice and profess a knowledge of goodness and equity—separating what is lawful from what is unlawful, the right from the wrong; a true philosophy, if I mistake not, and not a sham." While

another of his famous sayings, though it does not rise to the high ideal of the Sermon on the Mount, seems like a faint adumbration of it. *Præcepta juris sunt hæc : honeste vivere, alterum non lædere, suum cuique tribuere.* The precepts of law are these : to live uprightly, not to hurt a neighbour, and to render to everyone his own.

Bearing in mind the powerful influence which the *jus gentium* and the *jus naturale* respectively had in developing the Civil law of Rome, and that the latter rather than Christianity is responsible for its amelioration, some of the changes which the recognition and establishment of Christianity effected may now be briefly enumerated.

The influence is seen in two directions :—

- (1) In the promulgation of new laws to meet new conditions. With the establishment of Christianity came new corporations, new offices, new men. Such a change demanded a fresh body of law.
- (2) In the amendment of existing law to meet the more rigid morality of Christianity.

From the unwillingness of the Christians to bring their disputes before the civil tribunals, there had grown up besides the Civil law another system, viz., Church or Canon law ; but this, in the earlier stages at least, was concerned with discipline, with pains and penalties in a future state, rather than with punishments in this life.

“Unhappily,” says Milman, “the Civil and Canon, the the Imperial and Christian, legislation would not maintain their respective boundaries. This arose partly from the established constitutional doctrine of Rome, that the Republic (now the Emperor) was the religious as well as the civil head of the Empire ; partly from the blindness of Christian zeal, which thought all means lawful to advance the true or to suppress erroneous belief ; and therefore fell into the irreconcilable contradiction of inflicting temporal

“ penalties by temporal hands for spiritual offences. Athanasius hailed and applauded the full civil supremacy of the State when it commanded the exile of Arius; contested, resisted, branded it as usurping tyranny, when it would exact obedience from himself.”

The usual division of Roman law is tripartite, viz.,

- (A) That affecting Persons,
- (B) That dealing with Things, and
- (C) That relating to Actions.

(a) *Persons*.—In dealing with the mind of the ancient world, there is one strange phenomenon with which we continually meet, viz., the defective sense which it had of personality. The conception of personality is so familiar to us that we are apt to forget how long it took to assert itself. Professor Mozley points out the defect, and uses it partly to explain human sacrifices and the custom of including an innocent wife or children in the punishment of a guilty husband or father. But according to ancient ideas, the wife and children had no distinct individuality apart from the husband or father; they were looked upon as part of his belongings, just as his land, houses and cattle. This, to us, strange conception is very marked in Roman law. It explains such institutions as the *patria potestas* and slavery. “As a code for the regulation of ‘property,’ says Mozley, ‘the Roman law commands our admiration; its assumptions, its distinctions, its fictions, are of the highest legal merit; its whole structure was based upon nature and common sense, and it carried into the most intricate details and applications an instinctive standard of equity, of which it never lost sight. The contrast is therefore all the greater when, from the regulation of property, we turn to its dealings with persons. In the former we have an anticipation of modern civilisation, and we feel ourselves amid modern ideas and in the



“atmosphere of our own Courts. In the latter we are con-  
 “signed to barbarism again.” Slavery was so universal that  
 its wrongfulness does not appear to have occurred to the  
 ancients. St. Paul’s attitude towards it is significant. He  
 recognised the *status quo*. He did not counsel wholesale  
 emancipation, for which the time was not ripe, and which  
 would not have been an unmixed blessing; but he incul-  
 cated those principles which in the fulness of time brought  
 about the abolition of slavery. “The logic of the Roman  
 “Law was saved *not* by the denial of liberty to the person,  
 “but of personality to the slave.” “Agricultural imple-  
 “ments,” says Varro, “are of three kinds: vocal, as slaves;  
 “semi-vocal, as oxen; dumb, as carts.” The slave, in short,  
 was a *thing*, and not a person. On the whole, however, the  
 Romans did not treat their slaves badly. According to  
 Ulpian, slavery was against the law of nature, and if the  
 Civil law did not recognise this, at all events it gradually  
 mitigated the hardships of the slave’s life. Hadrian had  
 provided that a master who killed his slave might be tried  
 for murder by the ordinary tribunals, and in progress of time  
 slaves were allowed to dispose of one-half of any property  
 they might have acquired. They had no marriage in the  
 strict sense; their unions were not blessed by the Church  
 until the time of Basil the Macedonian, A.D. 867—886.

As regards the *patria potestas*, this peculiarly Roman Insti-  
 tution, as Gaius considered it, *jus potestatis quod in liberos*  
*habemus proprium est Civium Romanorum*, involving the right  
 of life and death, exile and slavery, was shorn of its preroga-  
 tives before the establishment of Christianity, and Milman  
 thinks it well this was so, otherwise there might have been  
 many domestic martyrdoms on the adoption by children of  
 the new religion.

The establishment of Christianity did something to restore  
 the dignity of marriage. In early times the marriage of the  
 Roman patrician was accompanied by a religious ceremony.

The bride and bridegroom sat on the same sheep-skin and partook of the sacred cake, hence the name *confarreatio*. But in course of time, many Roman women preferred the less exacting ties conferred by the less formal ceremonies known as *coemptio* and *usus* respectively. Now the religious rite was resumed. Preliminary to the marriage, certain espousals appear to have been entered into, and the Christian was advised to take counsel with his Bishop. Then followed the marriage *in facie ecclesiæ*, giving to the union a peculiar holiness. But it was the civil contract which determined the validity of the marriage, regulated the legitimacy of children, and the rights of succession. It was not till after the legislation of Justinian that the Church had jurisdiction in matrimonial questions.

As regards polygamy, the Christian Church had nothing to fear from the Civil law, which defined marriage as *virī et mulieris conjunctio individuum vitæ consuetudinem continens*, a definition strict enough to satisfy the requirements of the New Testament.

So too in the matter of the prohibited degrees, Christianity might safely rely on the requirements of the Roman law. But it constituted certain spiritual relations unknown to that system a bar to marriage, as, for example, the relation of God-parents and their God-children, and while concurring with the Roman law in reprobating marriage with certain classes of persons, as slaves and actresses, it also discouraged marriage with heretics.

There was one feature in the marriage law for which Christianity was directly responsible, viz.: the repeal of the caducary provisions of the *Lex Julia et Papia Poppea*, a law passed A.D. 9, *inter alia* to encourage fruitful marriage. When, under early Christianity, celibacy was regarded as a state of pre-eminent virtue, it would have been illogical to continue to impose fines and restrictions upon the unmarried.

Perhaps in no department was the influence of Christianity

more apparent than in that of divorce. Muirhead calls it a "miserable chapter in the history of the law." The law was subjected to successive tinkering at the hands of imperial legislators from Constantine to Justinian. Though nominally the respect for marriage was great, practically it was a contract which either party might break without alleged cause, and divorce was too easily procured. To their credit it must be admitted that the Romans did not avail themselves of the right to dismiss their wives till the more degenerate days of the later Republic, and though perhaps we ought not to take the descriptions of a satirist like Juvenal, or of a stern moralist like Seneca too literally, still there can be no doubt that the prevalence of divorce was one of the great blots on later Roman civilization.

*Sic fiunt octo mariti quinque per autumnos.* (Juvenal, *Satire* VI, 20.)

"*Non consulum numero sed maritorum annos suos computant,*" says Seneca, and Jerome saw a man in Rome living with his twenty-first wife, she having buried her twenty-second husband; while the Bishop of Amasia declared "that men "changed their wives just as they did their clothes."

Justinian tried to impose a condition on parties to a divorce by common consent, that each should enter a convent, but this was repugnant to public opinion and not conducive to the morals of such institutions, and so was repealed. Justinian would appear to have oscillated between the Civil and Ecclesiastical law to some extent. According to Muirhead, his legislation was levelled at one-sided repudiations, and was meant to punish the party in fault and to discourage flimsy pretexts. But his attempts to restrain divorce within narrow limits were not followed. "The "successor of Justinian," says Gibbon, "yielded to the "prayers of his unhappy subjects and restored the liberty "of divorce by mutual consent. The civilians were unanimous, the theologians were divided, and the ambiguous

“ word which contains the precept of Christ, is flexible to  
“ any interpretation that the wisdom of a legislator can  
“ demand.”

(b) *Things*.—In the law relating to “ things ” or “ pro-  
“ perty,” the establishment of Christianity introduced no  
great change. The Churches took the place of the heathen  
temples. Formerly gifts to temples were inalienable and  
impignorable. The property of the Church was held under  
the same conditions, but it might be leased or the usufruct  
thereof granted under certain conditions, and one exception  
shows the influence of Christianity: gifts might be pledged  
for the redemption of captives. But as a rule the Church  
never relinquished her property. “ The Church,” says  
Milman, “ was the sole proprietor, whom forfeiture or con-  
“ fiscation could never reach; whose title was never anti-  
“ quated; before whose hallowed boundaries violence stood  
“ rebuked; whom the law guarded against her own waste  
“ or prodigality; to whom it was the height of piety, almost  
“ ensured salvation, to give or to bequeath, sacrilege to  
“ despoil or defraud; whose property if alienated was held  
“ under a perpetual curse, which either withered its harvest  
“ or brought disaster and ruin on the wrongful possessor.”

To Christianity, and the exertions of the Church, is also  
due the provision which the later law made for widows out  
of the estates of their husbands.

(c) *Actions*.—Under the head of Actions, a few words  
may be said about the Criminal law and its execution.  
Christianity did not modify it to any great extent. The  
Roman Criminal Code does not appear to have been one of  
extraordinary severity. Crucifixion, as was natural, was  
abolished as a punishment more, it has been thought, from  
a feeling of reverence than of humanity; but torture was  
sanctioned, and long continued. One of the greatest blots  
on ancient civilization was infanticide. To a Christian

emperor belongs the honour of first declaring the exposure of infants to be a crime. This abominable practice, however, died slowly, and even after the introduction of Christianity it was the practice to expose infants in church, leaving them to the compassion of the clergy. The influence of Christianity is also seen in the attempted revival of the rigour of the Mosaic law in sins and crimes of impurity. The changed point of view from which suicide came to be regarded is another instance of the influence of Christianity. "The " Civilians have always respected," says Gibbon, "the natural " right of a citizen to dispose of his life. . . . But the " precepts of the Gospel, or the Church, have at length " imposed a pious servitude on the minds of Christians, and " condemn them to expect, without a murmur, the last stroke " of disease or the executioner."

Prisons were subject to Episcopal inspection, and private prisons were prohibited.

With the establishment of Christianity arose a new class of crime, namely, heresy. The old Roman theory had been that the religion of the State must be that of the people. Christianity, which had shattered this theory, was now in power, and again put it into practice. No mercy was shown to heretics. Manicheans and Donatists were liable to confiscation of property, and might be deprived of the right to inherit or bequeath. Nor did death exempt them from conviction, for, like accused traitors, they might be convicted in their graves. Other heresies were also penalised.

The Bishops had no criminal jurisdiction, but the establishment of the Bishop's Court was one of the changes for which Christianity was directly responsible. Its origin is to be found in the Apostolic precept that Christians should bring their disputes to one of their brethren. After its legalization, the Bishop's Court had concurrent jurisdiction with, and was often preferred to, the Civil Court. At one time either party might transfer a suit to the Bishop's Court,

irrespective of the will of the other; but Honorius reverted to the rule that in case of lay litigants the consent of both must be obtained.

Such briefly are some of the changes consequent upon the establishment of Christianity. In several respects they constitute changes of machinery rather than of material, for though Christianity could not fail to have far-reaching effects upon the *Corpus juris civilis*, the principles of that magnificent system were well nigh definitely settled before Christianity attained temporal, as well as spiritual, supremacy. The provisions due to Christianity were rather additions to, than integral parts of it, and perhaps did not penetrate that solid mass to any great depth. In short, though the humane and ameliorating influence of Christianity on the Civil law is undoubted, yet the earlier influence of the spirit of equity, due partly to the *jus gentium* of the prætors, and in a still greater degree to the *jus naturale* of the classical jurists, must never be forgotten in forming a true estimate of the various agents which helped to develop the Law of Rome.

H. W. GIBSON.

## II.—SOME SUGGESTED AMENDMENTS OF THE ALIENS ACT 1905.

THE multifarious interest that Sir James FitzJames Stephen most justly claims for the history of the criminal law, may be claimed, *sub modo*, for the Aliens Act.<sup>1</sup> It is rather curious to note that that great writer does not give any account of the history of legislation on the subject of aliens.<sup>2</sup> The history of legislation on the subject of

<sup>1</sup> *A History of the Criminal Law of England*, Preface, p. ix.

<sup>2</sup> Cf. on this subject Phillimore's *International Law*, Vol. I, p. 233; Campbell's *Life of Lord Loughborough*; *Lives of the Chancellors*, Vol. VIII, p. 112; the debates in the *Annual Register*, and May's *Constitutional History of England*, Vol. III, c. 11, p. 50.

aliens, however, clearly possesses interest on religious, political, and constitutional, as well as on social and economic grounds. It is intimately connected with religion through the Right of Asylum. It possesses great political interest because, down to the present day, legislation prohibiting the access of aliens to our shores has been contemporaneous with disturbances on the Continent. The cause of the first Aliens Act of 1793 was the French Revolution and the execution of Louis XVI, and it is as obvious that the cause of the Act recently passed is political disturbance in Russia, on a scale that cannot without mere euphemism be considered to be less than revolution.

It is equally impossible to deny that modern legislation prohibiting the access of aliens has a bearing on International law that is considerably more intimate than that usually possessed by a statute on the Criminal law. Grotius, Puffendorff and Vattel, all directly discuss the subject. The social and economic aspect of the question is probably even more important; the causes and origin of the steady volume of immigration flowing from Europe to the United States, which has comprised no less than twenty million people in eighty years, are some of the most striking phenomena of modern history.<sup>1</sup> The United States legislation regulating this great tide of immigration dates back to 1847, and has as its avowed object, as enunciated in the last Immigration Act of 1903, the protection of American labour. The object of the British Act of 1905 appears to be implicitly identical with that of the Immigration Act of the United States passed in 1882—the exclusion of aliens who are likely to become a public charge.<sup>2</sup>

\* <sup>1</sup> The industrial and economic importance of immigration questions in modern times was alluded to in some articles that appeared in the *Times*, on the administration of the Aliens Act, April 18, 26, May 1, 8, June 5, 1906. The Naturalization Act 1870 probably owes its passing to the great volume of immigration into America from the United Kingdom. Cf. the argument of Shee, K.C., in *R. v. Lynch*, (19 T. L. R. 163, 169).

<sup>2</sup> Forty-Seventh Congress, Sess. 1, c. 376, s. 2, 1882, and speech of Mr. A. J. Balfour in the House of Commons, *Times*, May, 1905.

The character of the Act is necessarily one which deals "in a very expeditious manner with a matter of administration."<sup>1</sup> Hence its merits or demerits are essentially to be tested by the effect of its administration, and there is now ample material to form a conclusion. In some able articles that appeared in the *Times* on the working of the Act, the conclusion substantially arrived at was, that the exception to the prohibition against landing arising in the Right of Asylum was the most difficult point in the administration of the Act, but that in that respect the measure will justify itself if given a fair chance. It is difficult, at least according to the effect of the Removal of Aliens Act 1848, to regard the expulsion sections of the present Act as other than signally effective. Under the Act of 1848 the power of removing aliens on mere suspicion, which it conferred on the Executive, was not put in force in a single instance.<sup>2</sup> But the Secretary of State has made no less than 105 expulsion orders under section 3 of the Aliens Act now in force, and no less than 246 expulsion certificates have been issued on a recommendation from a convicting Court.<sup>3</sup> It is most material, as far as the success of the Act is concerned, to note that Mr. H. Gladstone has stated that no country, to his knowledge, refuses to receive its nationals when expelled from these shores, though there is sometimes a difficulty in establishing nationality. The very extensive powers of the Secretary of State under section 8 have rendered ineffectual the various devices resorted to to evade the Act, such as the vicarious possession of a sufficient sum of money to entitle the steerage passenger to land, and attempting to land at a non-immigration port, or embarking in a vessel for this country which carries less than the minimum number of

<sup>1</sup> Speech of Mr. A. J. Balfour, House of Commons, July 4th, 1905.

<sup>2</sup> Parliamentary Return, 1850, p. 688, referred to in *May's Const. Hist.*, Vol. III, c. 11, p. 53.

<sup>3</sup> *Times*, June 12th, 1906.



steerage passengers fixed by the Act. A point of considerable interest arises in the fact that a large number of French anarchists have landed in this country, some of whom, at any rate, were under the necessity of claiming the Right of Asylum, as they would otherwise have been prohibited from landing on the ground of insufficient means.<sup>1</sup>

Mr. H. Gladstone appears to have stated that the Aliens Act made no provision for the exclusion of anarchists, as such. While this is indisputably the case, it appears no less certain that anarchists cannot claim the Right of Asylum under the Aliens Act, because anarchy is not a "political offence within the meaning of the Extradition Act."<sup>2</sup> The Right of Asylum is no doubt subject to a larger construction by the Aliens Act, s. 1, than by the Extradition Act, 1870, s. 3, sub-s. (1), but only as regards persons fleeing from religious persecution, an extension which could not possibly avail a person who held the tenets of anarchy, without doing violence to the ordinary use of language. It seems essential to conclude that anarchists are implicitly excluded from claiming the Right of Asylum under the Aliens Act, since anarchy is neither a political nor a religious offence for the purposes of the statutory recognition of the Right of Asylum. But the language of the law in this respect seems most infelicitous.

The efficacious and conscientious manner in which, it seems admitted on all hands, the Act is being administered, is all the more meritorious when it is remembered that it is more than seventy years ago that an Act of the kind

<sup>1</sup> Cf. the question of Sir W. Evans-Gordon addressed to the Home Secretary, *Times*, June 15th, 1906.

<sup>2</sup> In *In re Meunier* (L. R. [1894], 2 Q. B. 415, 419), Cave, J., observes that anarchist offences are directed mainly against private persons, and that anarchy is not a political offence within the meaning of the Extradition Act.

existed.<sup>1</sup> A very able writer in the *Times*, in some articles on the Aliens Act recently referred to, observed that Germany is a country peculiarly affected by our Aliens Act. The most experienced emigration officer in Germany, through whose hands some 150,000 emigrants had passed, described this country as being no longer what it was before the Act, the Eldorado of the German emigrant. The German emigrant found our shores a certain half-way house to America. He proceeded thither if possible, but, if debarred by the operation of the American Immigration Act, he remained in the United Kingdom at least till he could find an opportunity for evading the American law. Now he can do so no longer.

A suggested amendment of the Aliens Act, the necessity of which is indicated by the experience of its administration, is to exempt infants from its operation. Infants were invariably excepted by all the previous Aliens Acts, even in those whose severity has long since procured the censure of history.<sup>2</sup> The experience gained by the administration of the present Act since it came into force shows the indubitable urgency of amending it so as to except alien infants under fourteen from its provisions. The Home Secretary admitted that a painful case had occurred of an idiot girl,

<sup>1</sup> The following figures which prove the thoroughness of the administration of the Act are taken from Parliamentary Papers.

	January.	February.	March.	Total.
Number of aliens received . . . .	2,727	2,331	2,926	7,984
Refused leave . . . . .	202	132	77	411
(a) Wanted . . . . .	172	102	60	334
(b) Medical . . . . .	30	30	17	77
Appealed to board . . . . .	199	123	73	395
Appeals allowed . . . . .	113	82	48	243
Finally refused . . . . .	86	41	25	152

The number of aliens stated in the first line includes 212 who arrived at "Non-Immigration" Ports.

<sup>2</sup> Stat. 33 Geo. III, c. 4 (1793); Stat. 38 Geo. III, c. 50, s. 22 (1798); Stat. 42 Geo. III, c. 92, s. 15 (1802); Stat. 43 Geo. III, c. 155, s. 35 (1803); Stat. 54 Geo. III, c. 155, s. 16 (1814); Stat. 55 Geo. III, c. 54, s. 33 (1815);

nine years of age, who had been refused leave to land.<sup>1</sup> The refusal of leave to land in this case seems all the worse since it was not a case of contagious disease. When it is a case of contagious disease, Vattel considers that even fugitives and exiles ought absolutely to be rejected.<sup>2</sup> Vattel, it is true, draws no distinction between adult and infant aliens, but it can hardly be supposed that a writer of his well-known humanity considered that the full force of the national right to exclude aliens which he himself postulates should fall on aliens who were infants. A few days after the above case Mr. Gladstone expressed the decided opinion that Parliament never intended that the refusal of leave to land should be applied in cases where it would involve great personal hardship to women and children.<sup>3</sup> In this respect, proceeding by the Act itself, it is clear that we have much to learn as regards practical humanity from the manners of a hundred years ago, and it is desirable on every ground that the recent legislation should be brought into harmony with the war Aliens Acts of even the eighteenth century. It is also submitted that it is advisable to except the servants of Ambassadors from the operation of the Act. This also would be merely bringing the recent legislation into harmony with the early Aliens Acts, by all of which the servants of an Ambassador were invariably excepted, generally in the same section as that in which infants were excepted. The possibility of an awkward diplomatic incident might thus be avoided.

The case of Onix, a deserter from the Russian Army instances, it is to be feared, only one of the several cases in

Stat. 56 Geo. III, c. 86, s. 15 (1816); Stat. 7 Geo. IV, c. 54, s. 16 (1826); Stat. 6 Will. IV, c. 11, s. 11 (1836); Stat. 11 Vict., c. 20, s. 6 (1848). This is substantially the complete category of previous Aliens Acts. Other Acts, enumerated in Phillimore's *Int. Law*, Vol. 1, p. 234, are merely Acts which renewed one or other of the above from time to time. As to the great severity of the earlier Aliens Acts, cf. May's *Const. Hist. Engl.*, Vol. III, p. 51, *et seq.*

<sup>1</sup> *Times*, March 6, 1906.

<sup>2</sup> *Droit des Gens*, l. i, c. xix, s. 231, and Aliens Act 1905, s. 1, sub-s. (3).

<sup>3</sup> *Times*, March 15, p. 7, col. b.

which the Right of Asylum has been wrongfully withheld. Mr. Gladstone expressed the decided opinion that Onix came under the designation of a political refugee, and that he ought to have been admitted.<sup>1</sup> Since the change made in the rules, it may fairly be hoped that refusal of leave to land will not in future be denied to any genuine refugee.<sup>2</sup> One Russian deserter was refused leave to land because there was a certain want of employment in the trade he exercised. This circumstance was treated as bringing his case within the prohibition against the landing of any alien steerage passenger who is likely to become a detriment to the public.<sup>3</sup> But Vattel observes that the Right of Asylum ought never to be refused to the unfortunate for slight reasons, and on groundless or frivolous fears.<sup>4</sup> It is very difficult not to regard this last denial of the Right of Asylum as one that would fall under the direct and positive censure of Vattel. The words likely to become "a detriment to the public"<sup>5</sup> ought to be construed solely in the light of their collocation, and therefore to be confined to persons labouring under disease or infirmity. On any other construction they seem either to have no meaning or else to be capable of indefinite extension.

The main object of the Act, on which it appeals to all parties, is to keep out diseased persons and criminals. As to the effect it has in this direction, fifty alien steerage passengers were refused leave to land in February. In thirty-eight cases the reason for refusal was failure to show possession or prospect of sufficient means, and in twelve cases the refusal was based on medical grounds.<sup>6</sup> It would obviously not derogate in the slightest degree from the prohibition against the landing of undesirable immigrants

<sup>1</sup> *Times*, March 6, 1906.    <sup>2</sup> Cf. the speech of Mr. Gladstone, March 15, 1906.

<sup>3</sup> Aliens Act, s. 1, sub-s. (3), par. b.    <sup>4</sup> *Droit des Gens*, l. i, c. xix, s. 231.

<sup>5</sup> Aliens Act 1905, s. 1, sub-s. (3), par. b.

<sup>6</sup> Statement of Home Secretary in Parliament, *Times*, April 4, 1906.

in the Act, if the provision requiring the expulsion of an alien merely on the ground of his poverty were repealed.<sup>1</sup> It seems to be the *rationale* of this provision that an alien pauper has no right to relief by the poor law. It must be at once admitted that there is high authority for this position.

Lord Chief Justice Holt observed that "he did not know that a foreigner had a right to be maintained in any place to which he came; but that they might let him starve."<sup>2</sup>

In 1803, Lord Ellenborough, C.J., alluding to the above *dictum*, declared that: "We owe it to the memory of Lord C. J. Holt to believe that he never uttered such a sentiment."<sup>3</sup> In this case Lord Ellenborough observed: "As to there being no obligation for maintaining poor foreigners before the statutes ascertaining the different methods of acquiring settlements, the law of humanity, which is anterior to all positive laws, obliges us to afford them relief, to save them from starving; and those laws were only passed to fix the obligation more certainly, and point out distinctly in what manner it should be borne."<sup>4</sup> It is rather interesting to observe, that Lord Holt, who clearly must be supposed to have uttered the *dictum* that the alien pauper might be let starve, must have been a witness of the extension of the Right of Asylum to the Huguenots by this country, and there were no Aliens Acts in force in his day, or indeed, long after. Again, at the time Lord Ellenborough insisted that the pauper alien had a right to poor law relief, the Legislature was passing Aliens Acts of great severity, and was denying aliens many Common law rights.<sup>5</sup>

In spite of Lord Ellenborough's protest, the report makes it quite clear that Lord Holt must have uttered

<sup>1</sup> Aliens Act 1905, s. 3, sub-s. (1), par. b (i).

<sup>2</sup> Cf. *Sessions Cases adjudged in the Court of King's Bench*, Vol. I, p. 105.

<sup>3</sup> *The King v. The Inhabitants of Eastbourne* (1803), 4 East, 103, 104.

<sup>4</sup> *Ibid.*, *supra*, p. 106.

<sup>5</sup> Lord Campbell's *Life of Lord Loughborough*, Vol. VIII, p. 112; *Lives of the Chancellors*; May's *Constit. Hist. Engl.*, Vol. III, p. 51.

the observation, and moreover, it was not a mere *dictum*, but an essential part of the decision. An appeal, moreover, to the principles of the Common law seems to vindicate the opinion of Lord Holt.<sup>1</sup> Littleton considered that an alien can bring no action real or personal; a sentence that Sir F. Pollock and Prof. F. Maitland seem inclined to accept in its integrity, without introducing any exception in favour of an alien in real and personal actions. But though it may have once been the principle of the Common law that an alien has no right to poor law relief, there is some reason to suppose the ancient Common law was more favourable to aliens,<sup>2</sup> since, in 1454, it was said that a foreign merchant might have a house and defend his possession of it by action of trespass.<sup>3</sup> From the point of view of comparative jurisprudence, it is contrary to the usage of Western Europe to expel an alien on the mere score of his poverty. M. Edouard Clunet, in a very learned and brilliant note on the topic of the expulsion of aliens in French law,<sup>4</sup> observes that in France—"the want of means of subsistence is not a sufficient ground of expulsion. . . . The Law of 1849, whether we consider its spirit or its text, seems to us to furnish no legal means for preventing aliens from crossing our frontier, or even for expelling them from the country, on the sole ground of their indigence." In Portugal there are no special rules applicable to aliens in virtue of the fact of their destitution. In Spain, vagrancy is not a crime since the Penal Code of 1870. In Saxony, there is no police interference with foreigners on the mere score of poverty. In Prussia, it is only in aggravated cases that a destitute person is, under Articles 361-2 of the Penal Code of the German Empire,

<sup>1</sup> *History of English Law*, Pollock and Maitland, Vol. I, p. 447.

<sup>2</sup> *Hist. of Engl. Law*, *ibid.*, p. 448.

<sup>3</sup> *Year Book*, 32 Hen. VI, f. 23 (Hil., pl. 5), and *ibid.*, *Hist. Engl. Law*.

<sup>4</sup> Parl. Pap., Comm. Rep., 1887, No. 81, pp. 25, 28.

handed over to the Government police,<sup>1</sup> to be expelled from the territory of the German Empire. It therefore seems clearly to follow that, in normal circumstances, indigence is not a ground of alien expulsion in the German Empire. Denmark, Montenegro, Wurtemberg, Roumania and Servia, however, expel aliens on the sole ground of their indigence. In December, 1886, Austria and Russia signed at St. Petersburg, a convention for regulating the repatriation of their respective subjects in cases where it should be deemed necessary, owing to the lack of means of subsistence, vagrancy, or absence of passports.<sup>2</sup> In Italy, by the Circular of the 14th October, 1885, in the case of the detention of an alien who is liable to be expelled on the ground of his poverty, it is provided that he shall not be kept longer than is absolutely necessary for the completion of the legal formalities.<sup>3</sup> The statement made by Mr. H. Gladstone in the House of Commons shows that there is no detention of any kind in the case of an alien against whom an expulsion order has been made. In most cases steps are taken to deport him immediately when he has not committed any crime; and if this is not done, he is allowed to find his own way out of the country.<sup>4</sup> A suggested amendment, in the direction of strengthening the Act, is that a repeated defiance of an expulsion order by an alien should involve additional punishment. The application of the Vagrancy Act 1824, s. 4, to the Aliens Act induces the view that an alien may be whipped,<sup>5</sup> and therefore it may be said that one form of additional punishment is in fact incurred for such an offence. But it is submitted that this liability, which seems clearly to exist, would probably not be found operative, and in any case is not adequate to the offence.

All the previous Aliens Acts provided an additional term of punishment in such a case. By the Acts of 1793 and

<sup>1</sup> Landespolizei.

<sup>2</sup> Cf. Parliamentary Papers, 1887, No. 81.

<sup>3</sup> Parl. Papers, *ibid.*, *supra*, p. 35.

<sup>4</sup> *Times*, June 15th, 1906.

<sup>5</sup> Vagrancy Act 1824, in Chitty's *Statutes*, Vol. XII, p. 6 and *note*.

1802, it involved capital punishment for an alien to be found within the realm after he had been sentenced to be transported.<sup>1</sup> By the Act of 1803 aliens not departing the realm when ordered to do so by proclamation were liable to be transported for life.<sup>2</sup> By the Act of 1814, an alien who was found within the realm after he had been ordered to be expelled was liable to be imprisoned for one month for a first offence and for twelve months for a second offence. The same liability to increased punishment for defiance of an expulsion order was provided by statute long after reform had been instituted in the Criminal law.<sup>3</sup> This seems a conclusive reason for amending the Aliens Act 1905, by providing an additional punishment to meet the case of an alien who is found within the realm a second time after an expulsion order has been issued against him. By the existing law, the alien who returns to this country after having been expelled incurs merely the same liability, that of being imprisoned for three months with hard labour, however often he were to repeat his offence.<sup>4</sup>

In view of the internecine convulsions into which Russia has recently been plunged, it is impossible not to admit that the plight of refugees landing on our shores may represent the nadir of human vicissitude, and that it excites pity and horror as much as a tragedy of Æschylus. Hence it may be pleaded that a section should be added to the Aliens Act, creating an immigration fund for the relief of distress, by imposing a nominal duty of say one penny for each and every passenger not a subject of the King who shall come by steam or sailing vessel from a foreign port to any port within the United Kingdom. It is impossible to deny that such a course has many reasons for its adoption. The

<sup>1</sup> Stat. 38 Geo. III, c. 50, p. 24; Stat. 42 Geo. III, c. 92, s. 20.

<sup>2</sup> Stat. Geo. III, c. 155, s. 2.

<sup>3</sup> Cf. Stat. 54 Geo. III, c. 155, s. 3, and Stat. 11 Vict., c. 20, s. 2.

<sup>4</sup> Cf. Aliens Act 1905, s. 1, sub-s. (3), par. d; and s. 3, sub-s. (2); and s. 7, sub-s. (1).



Immigration Act of the United States, 1882, creates such a fund for a similar object, though those who administer the United States Act do not receive remuneration, like those who administer the Aliens Act in this country.<sup>1</sup> The passenger movement into the United Kingdom rivals that into the United States, and a substantial fund can therefore be as easily created in the former case by the same method as it has long been in the latter.

Finally, it is submitted that the recent Order issued under the Act, giving the alien the benefit of the doubt whether he is an undesirable immigrant or not, when he comes from a disturbed part of the Continent,<sup>2</sup> conflicts neither with the letter nor spirit of the Act. The inquiry whether an alien immigrant is undesirable or not does not constitute a charge.<sup>3</sup> But it may not be unfairly described as a quasi-charge. The alien incurs a criminal liability to a maximum term of three months' imprisonment with hard labour for making a false statement either to the Immigration Officer or Immigration Board, though he is not put upon his oath.<sup>4</sup> By the very terms of the Act, the question whether any offence is an offence of a political character, is finally reserved for the decision of the Secretary of State.<sup>5</sup> Hence there seems no inconsistency in applying to the inspection of aliens the rule about the weight of the evidence that obtains in criminal proceedings. To slightly paraphrase the well-known language of Baron Alderson, the recent Order under the Aliens Act requires that either the Immigration Officer or Immigration Board must be satisfied, before refusing leave to land, not only that the circumstances of the alien steerage passenger are consistent

<sup>1</sup> An Act to regulate Immigration, Forty-seventh Congress, Sess. 1, Chap. 376, ss. 1, 4.

<sup>2</sup> Cf. Mr. Gladstone's speech in the House of Commons, *Times*, March 15, 1906, p. 7, col. c.

<sup>3</sup> Cf. Speech of Sir R. Finlay on the Aliens Bill, *Times*, July 4th, p. 6.

<sup>4</sup> Cf. Aliens Act 1905, s. 7, sub-s. (4). <sup>5</sup> Aliens Act 1905, s. 8, sub-s. 4.

with his being an undesirable immigrant, but satisfaction must also be given, that the facts are inconsistent with any other rational hypothesis than that the alien is an undesirable immigrant.<sup>1</sup> It is clearly most material to note that the alien is only given the benefit of the doubt when he comes from disturbed regions of the Continent. The recent Order, therefore, consecrates the Right of Asylum, the pride and glory of our country.<sup>2</sup> "The glory of a nation," Vattel observes, "is intimately connected with its power, and indeed forms a considerable part of it."<sup>3</sup>

N. W. SIBLEY.

### III.—CRIMINAL STATISTICS, 1904.<sup>4</sup>

IT was our lot last year, in reviewing in this Magazine the Criminal Statistics for 1903, to indicate, as the conclusion to which those figures led, that in or about 1899 the decrease in the volume of crime which had been proceeding for the greater part of a decade was checked, and that in the period 1900-3 there was a steady and general increase in crime; and we suggested that this phenomenon should be connected with conditions of a temporary character, and in particular with the general industrial depression, linked with the non-absorption into the regular course of civil life of a considerable number of persons who had been engaged in and about the war in South Africa. We did not attempt to take a more lengthy survey into the past to discover whether, as compared with thirty or forty years ago, there had been an increase of crime or

<sup>1</sup> Cf. *Hodge's Case* (1838), 2 Lewin's Rep., 227-8.

<sup>2</sup> Cf. the speech of the Earl of Derby in the House of Lords, *Times*, March 2, 1858, and cf. the summing-up of Lord Campbell in *R. v. Bernard* [1858], (8 St. Tr., N. S., 887, 1055, 1061). <sup>3</sup> *Droit des Gens*, l. 2, c. xv, s. 186.

<sup>4</sup> *Judicial Statistics, England and Wales, 1904*. Part I.—Criminal Statistics. London: Wyman & Sons.

not; but we may mention here that this question was fully discussed in the Introduction to the Criminal Statistics for 1893—the first issue after the statistics had been remodelled to take their present form,—and the conclusion arrived at by the Editor was that there had been a general *decrease* in crime relatively to population in the 20 years 1874—1893, and that the decrease, though not so great as was frequently represented, was real and substantial, and as regards the particular classes of crimes of violence against persons and property was very marked indeed.

If it was right to connect the increase of crime observed in the period 1900—3 with conditions which at the same time had other injurious effects on the social and industrial life of the country, it would be reasonable to anticipate that the increase of crime, like the other unpleasant phenomena which accompanied it, should cease when by operation of the natural forces of recuperation the body social and industrial has been purged of these morbid conditions. Now, in 1906 when we write, there seems to be evidence (*pace* Tariff Reformers) that this process of recuperation has to a great extent been effected: the body industrial, at any rate, is well advanced in convalescence, not to say restored to a robust and healthy vigour, and may we not therefore look with hope to the criminal statistics for 1906 to indicate that once again a period of decreasing crime has commenced?

The best criterion for judging of the fluctuation in crime generally is that furnished by the figures giving the number of persons tried, summarily and on indictment, for offences which may be tried on indictment. Some account must also be taken of certain non-indictable offences which are of a criminal character, such as assaults (including aggravated assaults and assaults on police officers), cruelty to children, brothel keeping, malicious damage, unlawful possession or pledging of property, stealing animals, fences, fruit, &c., offences under the Prevention of Crimes Act, and

certain offences under the Vagrancy Acts, such as frequenting public places for unlawful purposes, being found on enclosed premises or in possession of picklocks. It is important, however, to bear in mind, what is sometimes forgotten, that the great mass of cases dealt with by Courts of Summary Jurisdiction are not of a criminal character at all, and it would be altogether inaccurate, not to say libellous, to include in the category of criminals persons charged with or convicted of such offences. A helpful check on conclusions based on the number of persons tried is furnished by the figures giving the number of crimes reported to the police as having been committed.

How, then, did 1904 stand as compared with previous years? Applying these criteria, which have just been mentioned, to the figures presented in the Volume of Statistics for 1904, it is found that 1904 falls into the period of increasing crime which began in 1899 or 1900: the principal features noticed in 1903 remain characteristic of 1904, though as regards some particular crimes the rate of increase was somewhat moderated in the latter year.

In 1904 the total number of persons for trial (summarily and on indictment) for indictable offences was 59,960 as against 58,444 in 1903, an increase of 1,516, or 2·6 per cent.; the figure for 1903 was reached, approximately speaking, by an annual increase of about 2,000 from the figure for 1899 (50,494), whereas for the five years preceding 1899 the number had remained fairly constant and averaged about 51,000. If allowance be made for the increase in population 1904 still shows an increase, for the proportion of persons for trial for indictable offences in that year to the total population was as 177·6 to 100,000, while in 1903 the representative figure was 175: the average for 1895-9 was under 164. The rise in 1904, though quite marked, was thus rather less than in the three preceding years. The testimony of the number of crimes reported to the police

was generally similar: the figures for the period prior to 1899 fluctuated more irregularly than those giving the number of persons tried, but the same steady and manifest increase set in after 1899. It is a noticeable feature, however, and one which must be allowed due weight, that in these figures there was no moderation of the increase in 1904; on the contrary, the increase was the greatest in the period under consideration. The actual figures are:—crimes reported in 1904, 92,907; reported in 1903, 86,172; annual average 1895-9, 79,459; or, considered relatively to population, 275 per 100,000 of population in 1904, as against 258 in 1903, and an annual average for 1895-9 of 255.

This increase in the total volume of crime was not distributed evenly among the various classes of crimes: for instance, in CLASS I—*Offences against the Person*, there was quite a marked drop in 1904. A striking characteristic of this class of crime appears to be the constancy of the number of persons tried for it in recent years, that is in England and Wales, so that in showing a decided drop the year 1904 was exceptional. So constant was the number of persons for trial from 1893-1903 that there was only one year, 1900, in which there was a variation of more than about 1 per cent. from the mean: the mean figure, that is apart from 1900, was 2,760, the figure for 1900 was 2,566, and for 1904 it was lower still, namely, 2,525. The total population of course increased steadily in this period, probably by about 14 per cent. in all, so that relatively to population there would appear to have been proceeding a very steady diminution in this class of crime. The drop in 1904 was distributed fairly evenly over most of the offences comprised in the class:—wounding (felony and misdemeanour), 852 to 747; rape and indecent assault, 791 to 740; endangering safety of railway passengers, 115-104, and so on. There was, however, no appreciable decline

under the heads murder and manslaughter, the number of persons tried and the number of crimes reported to the police being almost the same as in 1903, and only slightly below the average for the period 1900-4. The offence of bigamy, which is exceptional among the offences in Class I, in that it involves a large element of fraud, was another which did not share in the drop in 1904: on the contrary, it has shown some tendency to increase in recent years, the number of persons tried, which fluctuated between 117 and 93 between 1893 and 1902, having risen in 1903 to 127, and again to 138 in 1904.

The steadiness of the figures in this class of offences is an interesting feature, and furnishes a good example of what might be called the phenomenon of constancy in the mass where there is none in the individual. The great majority of such offences are due to momentary passion, and least of all depend on a determined or considered course of action; yet, when account is taken of some millions of persons with diverse characters and in diverse circumstances we find a succession of such crimes proceeding with a regularity comparable to that of clockwork. It brings to mind the quaint remark of Oliver W. Holmes, in his *Professor at the Breakfast Table*, on the regularity from year to year of the number of children who die from the effects of the rather curious and uncommon proceeding of drinking hot water from the spouts of tea-kettles.

CLASS II.—*Offences against Property with Violence.*—As in previous years since 1899, there was in 1904 an increase of this class of crime, that is of burglary, housebreaking, shopbreaking, etc., and robbery with violence. The increase in the number of persons for trial, namely, from 3,118 in 1903 to 3,187 in 1904, was not comparable in magnitude with the increase in the four preceding years, being only 2 per cent. (that is, about commensurate with the growth

of population), but the number of crimes reported to the police increased quite as fast as before, namely, from 9,920 to 10,857, or over 9 per cent.

Part of the apparent increase in this class of crime since 1899 is accounted for by an increase in the number of cases in which children between 12 and 16 years of age are charged, which is probably a direct consequence of the passing into law of the Summary Jurisdiction Act of 1899, which raised from 12 to 16 the age up to which offenders can be tried by Courts of Summary Jurisdiction for burglary and housebreaking and any other indictable offence save homicide. It has more than once been observed that such an introduction of quicker, cheaper, or simpler procedure has had the effect of increasing for a time the number of prosecutions, and in this particular instance there was a further apparent increase, because a number of cases in which children were really guilty of burglary or housebreaking had been dealt with as though the offence were simple larceny (in order to avoid the necessity of committal for trial at Quarter Sessions or Assizes), and after 1899 such cases would be dealt with and returned properly as burglary and housebreaking. The tendency of the figures to increase on these accounts would not be permanent, and probably the effect in this case was wearing off by 1904; at any rate the number of children tried summarily in that year dropped from 522 to 448; and it may be noticed in passing that but for this drop the total number of persons tried for these offences would have increased a good deal more than the 2 per cent. mentioned above, as there was an increase of 6 per cent. in the number of adults for trial.

**CLASS III.—*Offences against Property without Violence.***—There was again, in 1904, an increase in the number of persons tried for these offences, namely, from 51,009 to

52,600, or rather over 3 per cent., which was about the magnitude of the increase in each of the three preceding years. The increase in the number of crimes reported to the police was again much greater, namely, 8·5 per cent.,—from 68,645 to 74,443, which is the highest figure since 1888. As usual, the total was practically controlled by the number of simple and minor larcenies. The rather marked increase taking place in the number of cases of obtaining money and goods by false pretences (another result of a simplification of procedure introduced by the Summary Jurisdiction Act, 1899, which made this an offence triable summarily) was still maintained in 1904.

The number of offences under the Bankruptcy Acts—fraud in connection with bankruptcy proceedings, bankrupts absconding with moneys due to creditors, undischarged bankrupts obtaining credit without disclosing the fact of their bankruptcy, &c.—was unusually large in 1904: the number of persons tried (59) has only been exceeded once in upwards of 20 years, and the number of cases reported to the police (121) is the highest recorded since 1893, when separate returns were first made for this offence, and is nearly twice the average (67) for the decade. The number of such cases is not, however, large in itself, and it would probably be fair to attribute the increase in the figures to greater keenness on the part of the authorities.

CLASS IV.—*Malicious Injuries to Property*.—The number of persons for trial for these offences fluctuates somewhat irregularly from year to year, but the increase in 1904 was unusually large, namely, from 331 to 433, or over 30 per cent.: 219, or about half these persons, were charged with arson: 188, or most of the remainder, were charged with malicious injuries to property which are unspecified. The number of crimes reported to the police was 582 in 1904, and 532 in 1903.



The number of persons charged in these indictable cases of malicious damage which are not further specified is always small compared with the number of non-indictable cases; its fluctuations, too, are liable to occur without definite relation to the number of crimes committed, and depend largely on the number of drunken persons charged with breaking windows of shops or public-houses. It may, however, be observed that the number of persons tried for non-indictable malicious injuries to property also showed an increase in 1904, which took the place of a slight but steady decrease which had been going on for some years.

The number of persons tried for arson in 1904 was 219, an increase of over 50 per cent. on the figure for 1903 (143), which was about the average for the decade; and as this increase was accompanied by a very large increase in the number of cases reported to the police, it would appear that in 1904 arson was particularly prevalent as compared with years immediately preceding. It would perhaps be not altogether unfair to suggest that this increase may be connected with the increase which will have to be noticed below as having taken place in vagrancy offences; at any rate, it is the fact that arson is one of those crimes which vagrants appear particularly prone to commit, and that 1901, which is the year when a period of remarkable increase in vagrancy offences began, is also the year from which must be dated the steady increase in the prevalence of arson, by reason of which the number of persons tried rose between that year and 1904 from 117 to 219, and the number of cases reported to the police from 219 to 352.

CLASS V.—*Forgery and Offences against the Currency.*—The number of persons for trial, 310, was practically the same as in 1903, and as the average for the decade; the number of crimes reported, 562, was slightly above the number, 500, for 1903, and above the average. The slight progressive

increase in offences against the currency, which had been noticed for three or four years, appears to have continued in 1904.

CLASS VI.—*Miscellaneous Offences not included in the foregoing Classes.*—The figures for this class, as regards both the persons tried and cases reported, were practically stationary. Attempts to commit suicide, which increased steadily from 1897, showed some decline; the number of persons tried, which was 190 in 1897, rose till it reached 273 in 1903, but dropped again to 249 in 1904. The course of the figures for the number of crimes reported—figures always very much larger than those giving the number of persons tried—was similar, but the drop in 1904, namely, from 2,399 to 2,374, was a good deal less marked.

With regard to the nature and result of the proceedings against the 59,960 persons charged with indictable offences, it is interesting, firstly, to note the extent to which avail is taken by defendants of the provisions of the Summary Jurisdiction Acts for summary trial of indictable offences. In 1904 no less than 47,802, or 80 per cent., of the 59,960 persons for trial were dealt with solely by magistrates in Courts of Summary Jurisdiction, while only 3,559 were committed for trial at Assizes, and 8,597 for trial at Quarter Sessions. The magnitude of the proportion of persons dealt with summarily is striking testimony to the importance of the work done by Courts of Summary Jurisdiction. It may be remarked that the proportion of persons so dealt with has increased by about 3 per cent. since 1899, apparently as a direct consequence of the addition made by the Summary Jurisdiction Act 1899 to the power of magistrates, enabling them to deal summarily with all indictable offences (save homicide) committed by children between 12 and 16 years of age, and with certain offences, in particular obtaining money and goods by false pretences,

committed by adults. The proportion for the quinquennium 1895-9 was 78 per cent.; it rose in 1900, when the Act had come into force, to 81 per cent.; and it has since remained between 80 and 81 per cent. up to and including 1904.

Of the 11,871 persons actually tried on indictment in 1904, 1,896 were acquitted by the jury, and 9,918, or 83·5 per cent., were convicted; of the 47,802 persons dealt with summarily for indictable offences, 39,649, or 83 per cent., were convicted.

In the cases of conviction on indictment, 28 persons were sentenced to death on conviction for murder, of whom 17 were executed, and in addition 21 persons were found guilty of murder but insane, the jury returning a special verdict under the Trial of Lunatics Act 1883: these 21 persons were ordered to be detained as criminal lunatics during His Majesty's pleasure.

Examination in detail of the returns in Tables II and IV giving the sentences passed on conviction of indictable offences, brings out the rather interesting fact that in the course of the decade ending with 1904 there had come about an increased tendency, when imprisonment was inflicted, to pass longer sentences—a reversal, to some extent, of a tendency in the contrary direction, which had very marked effects in the preceding decade. The salient points of the change which took place between 1883 and 1893 as regards cases tried by Courts of Assize and Quarter Sessions were a decrease in the number of the longer sentences of penal servitude, a marked increase in the number of shorter sentences of imprisonment at the expense of the longer sentences, and an increase in the number of cases in which defendants were released on recognisances. The change was so striking in some respects that it may be worth while to mention the chief figures. The proportion of sentences of over 15 years' penal servitude fell from 3·3 to ·7, per 1,000 convictions on indictment, and the proportion of sentences

of over 5 years' penal servitude fell from 43 to 20 per 1,000 convictions, while the short sentences of penal servitude (3 years up to 5 years) remained practically the same, showing that the Courts availed themselves largely of the provisions of the Penal Servitude Act 1891, which first permitted sentences of penal servitude for terms of less than 5 years to be passed.

In 1904 the proportion of sentences of penal servitude was much the same as in 1893, but the shorter sentences of 5 years and under had increased from 79 to 83 per 1,000 convictions, while longer sentences were fewer, being 15 as against 20 per 1,000. This change was of similar character to that which took place in the preceding decade, but as regards sentences of imprisonment the change was very different. The total proportion of sentences of imprisonment fell from 833 to 802 per 1,000 convictions between 1883 and 1893, but so great was the extent to which shorter sentences had come to be passed in substitution for the longer sentences, that the proportion of short sentences of under 3 months was actually much greater at the end than at the beginning of the decade (288 instead of 205 per 1,000); but in 1904, at the end of another decade, while the total proportion of cases in which sentences of imprisonment were passed was practically the same as in 1893 (796 per 1,000), the longer sentences of over 6 months had increased from 281 to 333 per 1,000, at the expense of the short sentences of 3 months and under which had become so much more frequent in the preceding decade.

The change of practice in the case of indictable offences tried summarily was very similar. Between 1883 and 1893 the proportion of cases in which persons convicted summarily of indictable offences were punished otherwise than by imprisonment without the option of a fine increased enormously, namely, from 386 to 539 per 1,000 convictions—principally by reason of the frequency with which

magistrates availed themselves of the powers conferred on them by the Probation of First Offenders Act 1887, to release defendants on recognisances—and there was at the same time a tendency, when imprisonment was imposed, to pass shorter sentences. In 1904, however, while the proportion of persons released on recognisances had continued largely to increase, the total proportion of sentences of imprisonment was about the same as in 1893 (showing a slight *increase*), and there were decidedly more of the longer sentences and fewer of the short sentences of 1 month and under.

Turning now to consider the returns relating to non-indictable offences (Table XI, Courts of Summary Jurisdiction), the first thing which attracts notice is the magnitude of the figures. It has already been mentioned that 80 per cent. of the cases in which indictable offences are charged are dealt with solely by Courts of Summary Jurisdiction, and now we find from this Table that the number of persons dealt with for non-indictable offences reached in 1904 the enormous total of 747,179, or 2,213 per 100,000 of population: this was a slight increase in the absolute number as compared with 1903, but the proportion to population was practically the same as that for 1903, and as the average for the quinquennium 1900-4.

It was pointed out at the commencement of this article that only a small minority of these non-indictable offences are of a criminal character. The number of persons tried for all the criminal non-indictable offences numbered 89,254 in 1904, practically the same as in 1903, and rather below the average, (94,288) for the quinquennium 1900-4, when, it will be remembered, indictable crime steadily increased. There were, however, distinct changes in some of the classes into which these criminal non-indictable offences are divided: thus the total number of assaults fell from 58,576 in 1903 to 54,971 in 1904

(continuing the steady decline which had been proceeding for many years, and accompanying a drop in 1904 in the number of serious assaults triable on indictment): while, on the other hand, the various thefts which are not triable on indictment markedly increased from 5,803 to 7,325, and cases of malicious damage also increased, namely, from 15,678 to 16,918.

With regard to the enormous mass of non-indictable offences which are not of a criminal character, the most salient features appearing by comparison of 1904 with previous years may be summarised by saying that there was a continuation of the decrease which had been taking place since 1900 in the number of persons proceeded against for offences under the Elementary Education Acts, some increase in offences under the Highway Acts, a slight but general decrease in prosecutions for drunkenness and other offences under the Intoxicating Liquor Laws (a decrease which followed on a marked increase in recent years), a rather marked increase under the head Police Regulations, (carrying on an increase which had been proceeding steadily for many years in the metropolis and boroughs), and lastly, a continuation of the marked and important increase in the principal vagrancy offences, begging and sleeping out.

The decline in the number of persons proceeded against under the Elementary Education Acts, from 89,657 in 1900 to 58,464 in 1904, was of considerable magnitude; 1900 was the year when the maximum penalty for non-attendance of children at school was raised from five shillings to twenty shillings, but it would not be safe to attribute anything like the actual decrease in the number of proceedings to salutary effects produced by the measure increasing this penalty.

The great increase in the number of prosecutions for offences under the Highway Acts is partly an accompaniment of the rapid growth of motor car traffic and the introduction of many fresh regulations to meet the change

in traffic conditions: at the same time in 1904 there was also a decided increase under the head, "Bicycles," and in the number of various obstructions and other general traffic nuisances; the increase under the heads last mentioned is no doubt attributable principally to a stimulation of police activity. The total number of persons proceeded against for offences under the Highway Acts was 48,109 in 1904, as against 44,705 in 1903 and an annual average for five years of 43,063.

The number of persons proceeded against for drunkenness is always very large: in 1903 the number reached 230,180. This was a considerable advance on preceding years, no doubt attributable in great measure to changes in the law introduced by the Licensing Act 1902, which created several new offences and gave the police certain additional powers to assist them in repressing disorder in public places. There was a slight fall in the number of persons prosecuted in 1904, the total being 227,403, but this is not in itself of much significance.

The increase in vagrancy offences mentioned above as having been so marked since 1900 merits rather particular attention. The number of persons proceeded against in the period 1894-8 for begging and sleeping out was high, and averaged just over 25,000 per annum: the number fell in 1899 to 21,174, and in 1900 to 18,791; but from that year it increased rapidly, reaching 29,632 in 1903 (a considerable advance on the high figures of 1894-8), and again in 1904 there was a further large increase, namely, to 34,821.

An increase of this kind in the number of proceedings taken for vagrancy offences would naturally be taken to indicate that there was a corresponding increase in vagrancy, though one phenomenon need not, of necessity, involve the other. In the present instance, however, the two phenomena were manifested together, for it is one of the conclusions arrived at by the Departmental Committee on

Vagrancy, whose Report was issued in February of this year, that there was undoubtedly in these years, 1900-4, a continuous marked and general increase in vagrancy in England and Wales, and that the increase was continued in 1905.

The Committee find that there are now in the country very many confirmed vagrants, who, beside being a burden on the rest of society, are as a class guilty of some serious and much petty crime, particularly thefts, assaults, arson, and the extortion of "alms" from housewives by means of threats; they conclude that neither by means at present available nor by any adopted in the past can this class of vagrant be suppressed, at least while he is able to live so well on what he can get by way of doles from misguided persons, and they recommend that powers be given by Parliament to secure the segregation and detention of confirmed vagrants under reformatory or disciplinary treatment for long periods, and that provision be made for the better assistance of persons who are on tramp genuinely in search of work or on other proper business. From the figures given above the problem how best to deal with the vagrant would appear to be one of considerable magnitude and growing urgency at the present time.

With regard to the results of the proceedings for non-indictable offences generally, Table XI shows that of the 747,179 persons proceeded against, 121,414, or 16 per cent., were discharged without conviction, either on withdrawal of the charge, dismissal of it after examination, or under power conferred on magistrates by sect. 16 (1) of the Summary Jurisdiction Act 1879 at their discretion to discharge without conviction a defendant against whom a trifling charge has been proved. Further, there were committed to industrial schools 3,032 children, the proceedings in most cases being taken under the Elementary Education Acts.

Of the 615,812 persons who were convicted, only a



comparatively small proportion were sentenced to imprisonment without option of a fine, namely, 65,631 persons, or less than 11 per cent.: and in 54,610, or 83 per cent. of these cases where imprisonment was the sentence, the term was only one month or less. Fines were inflicted in 539,996 cases, or 87 per cent. of the whole. The majority of the remainder of the persons convicted were released on recognisances under the provisions of sect. 16 (2) of the Summary Jurisdiction Act 1879. It is interesting to note that the longer sentences of imprisonment (over three months) were nearly twice as many in 1904 as they were ten years before; but the actual number of such sentences was still very small, being only 1,271 in 1904. The respective proportions borne to the whole number of sentences by the number of fines, sentences of imprisonment, short sentences of imprisonment (one month and less) and recognisances, were almost precisely the same in 1904 as in 1894.

The business represented by the prosecutions under penal statutes is thus of enormous magnitude, but Table XIV shows that in addition to all this the Courts of Summary Jurisdiction transact a considerable volume of business which is not under penal statutes, but may be described as quasi-criminal in character. For instance, in 1904 there were heard 17,764 applications for orders against defendants to find sureties to keep the peace or for good behaviour, and 15,381 such orders were made; there were 22,901 applications for orders for payment of maintenance of wives, bastard children, children in industrial schools, &c., and 17,412 orders were made. All these orders are enforceable under the Summary Jurisdiction Acts as if they were convictions on information, and in 1904 there were 4,877 cases in which the defendant was committed to prison in default of compliance with such orders. Of orders otherwise enforceable, 58,480 were made, and 68,856 applications for such orders heard. The matters to which the applications and

orders related are very numerous and varied, but among them, as the most important, may be mentioned the disposal of stolen property, attendance of children at school, committal of children to industrial schools (principally under the Elementary Education Act 1873, and Industrial Schools Act 1866), nuisances and other matters coming under the Public Health Acts, separation of husbands and wives, recovery of small tenements, and vaccination.

The number of appeals to Quarter Sessions against convictions by Courts of Summary Jurisdiction is always strikingly small in comparison with the total number of convictions (Table XV). There were appeals in only 181 cases in 1904; in 84 of them the conviction was affirmed without alteration of sentence, in 22 cases the conviction was affirmed but the sentence modified, and in 75 cases the conviction was quashed. In proportion to the number of convictions, appeals were particularly numerous in motor car cases (26 appeals, in 10 of which the conviction was quashed), and in cases of conviction of publicans for permitting drunkenness on their premises (51 appeals, out of only 1,133 convictions, 27 convictions quashed).

Table XVI shows the results of the proceedings taken under the Extradition Treaties between the British and foreign Governments. Applications were made to the British Government in 71 cases, including 23 applications by France, 14 by Germany, and 10 by Switzerland: in 38 of these cases the accused person was surrendered, in 13 cases surrender was refused, and in the other 20 cases the accused could not be found or the application for extradition was withdrawn. Applications by the British Government for surrender of criminals from abroad were much fewer, namely 15. Surrender was granted in 7 cases, refused in none, and in 8 the fugitive could not be found or the application was withdrawn.

The number of prosecutions undertaken by the Director

of Public Prosecutions in 1904 was 504 (Table XVIII); 112 of these were capital cases, 157 were undertaken for Government Departments, 201 at the instance of judges, magistrates, or the police, and 33 at the instance of other persons. In these 504 cases 623 persons were charged, 583 with indictable offences and 40 with non-indictable offences (principally under the Labour Laws); 123 persons were prosecuted for murder, 76 for other offences against the person, 125 for frauds, 66 for bankruptcy offences, 60 for other offences against property, and 99 for currency offences. Of the 623 persons prosecuted 411 were convicted.

There are a number of points of great interest in the Prison Returns (Tables XXXI to XLI), but we can only refer to a few of them here.

The total number of persons received into prison after conviction was 198,395, exclusive of 758 persons sentenced by courts martial. Of course the great majority (actually 189,445) came from Courts of Summary Jurisdiction. The number of receptions showed a considerable increase, namely, from 188,678, the figure for 1903, an increase due partly to the increase in the number of persons convicted and partly to an increase in the proportion of persons who went to prison in default of payment of fines. This proportion increased substantially every year between 1900 and 1904, after having decreased nearly as much between 1893 and 1900. Of 422,299 persons sentenced in 1893 to pay fines, 79,876, or 18·9 per cent., went to prison in default of payment. In 1900 fewer persons, namely 78,345, went to prison in default of payment, though the number sentenced to pay fines (531,752) was much greater than in 1893; the proportion of committals was thus only 14·7 per cent. By 1904 the proportion had risen again to over 19·5 per cent., the number of receptions in prison being 107,625, while the number of persons fined was 550,490. It will be noticed how markedly prison population may be affected by changes of this kind.

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In the same years, that is between 1900 and 1904, there was an increase in the number of debtors received into prison from 12,375 to 19,217, or no less than 55 per cent. in the period of 4 years.

Table XXXVII gives the birthplace of prisoners received into prisons in England and Wales. In 1904 about 84 per cent. of convicted prisoners were born in England, 4 per cent. in Wales, 2 per cent. in Scotland, 7 per cent. in Ireland, and over 2 per cent. in foreign countries. In the course of the preceding decade there appears to have been a slight diminution in the proportion of Irish prisoners: in the same period the number of prisoners who had been born in foreign countries more than doubled, while the total number of prisoners had increased only by about one quarter.

It is very remarkable how high is the proportion of illiterate prisoners. Table XXXVIII shows that of nearly 200,000 persons received into prisons after conviction only about 6 per cent. were able to read and write well, while 35,703, or 18 per cent., are returned as being unable to read or write at all: only 495 persons are returned as being of superior education. Female prisoners appear to be worse in this respect than male prisoners, for the proportion of quite illiterate females was nearly 26 per cent., as against 15 per cent. of the male prisoners, and only 2·5 per cent. of the female prisoners were able to read and write well.

There would appear to have been some diminution in the proportion of quite illiterate prisoners in the course of the last decade. But, making all allowances for difficulties of maintaining a uniform standard of test and of applying any test thoroughly when so many of the prisoners are only in custody for quite short periods, these figures must be taken to show that there is still a large class of persons who got little or no education when they were children, or else have forgotten all they learnt, and that this class furnishes the bulk of the population of our prisons.

It is satisfactory to know that provision is made for teaching the elements of education to prisoners who are found on reception in prison to be illiterate—provided the prisoner is under 40 years of age, has a sentence of three months or more, and has not previously abused similar opportunities for receiving instruction. Those who have constantly under their notice the literary productions of prisoners often observe that a prisoner has either freshly acquired power to write and to express himself intelligibly in words or has much improved his powers under the instruction he has received in prison, and expressions of gratitude for benefits of this kind are not infrequently received from some classes of prisoners.

Table LIII deals with the exercise of the Prerogative of Mercy. The total number of cases in which the Prerogative of Mercy was exercised by way of remission of sentence in 1904 was 283. In 24 of these cases the remission was granted on grounds affecting the original conviction, and in 129 on medical grounds. It must not, however, be supposed that in all or nearly all of these cases of remission on medical grounds the prisoner's health had broken down during his imprisonment, for 70 per cent. were merely cases in which women were released a few days before their sentences expired, so that they might not bear children in prison and have to be detained beyond their sentences on account of unfitness for removal; and in the great majority of the other cases the prisoner had only been in prison for less than six weeks, and his disease had originated before his reception in prison.<sup>1</sup>

Tables F, (I) and (II), which are similar to tables which appeared in the volumes of Criminal Statistics for 1893, 1894 and 1898, contain figures showing the geographical distribution of crime, drunkenness and suicide, among the counties in England and Wales. The figures given are

<sup>1</sup> *Vide* the Report of the Prison Commissioners.

the average numbers and proportions to population for five years of persons tried in each of the several counties for (1) all indictable crimes; (2) crimes against property; (3) crimes of violence against the person—such as murder, manslaughter, wounding, assault, etc.; (4) crimes against morals—rape, indecent assault, unnatural offences, bigamy, etc.; (5) drunkenness; and figures are also given for the number of cases returned as suicide by Coroners' juries.

It is not necessary to discuss separately the figures relating to indictable crime as a whole, for crimes against property form so large a proportion that whatever is said about the distribution of this class of crime would apply, practically without modification, to the distribution of indictable crime generally.

With regard to crimes against property the county of Cornwall ranks very high, that is, as having the least proportion of persons tried to population. In 1893 Cornwall was first, by a wide margin, but in 1898 and 1904 there had been some increase of crime and the margin was reduced. The position of Wales is very striking. In 1893 there came next after Cornwall an unbroken succession of no less than eight rural Welsh counties, with two more separated only by the English counties of Westmorland and Huntingdon. By 1904, however, the proportion of crime to population had increased somewhat in some of these counties (in Radnor by 100 per cent., and in Denbigh and Flint by 50 per cent.) and certain rural English counties—Westmorland, Norfolk, Rutland, Cambridge and Suffolk—ranked higher.

In contrast to these rural Welsh counties the mining and seaport counties of Glamorgan and Monmouth have stood throughout as the two counties in England and Wales with most crime against property in proportion to population, Monmouth being worst of all by a substantial margin. Brecon belongs to the same group, being quite near the bottom of the list, and the adjacent county of Radnor was

little better in the period 1899—1904. London came next above Glamorgan in 1893, but in 1904 Durham and the North Riding of Yorkshire came between (the figures for London showed a distinct improvement), and four other English counties with large urban populations—Warwick, Northumberland, Stafford and Lancaster—also came close to the bottom of the list. It is noticeable that all the English counties, save Cornwall and Westmorland, which have the least crime against property, lie in the triangular area bounded on the east by the sea, on the south (approximately) by the Thames, and on the west by a line drawn from The Wash south-westwards, so as to include Rutland, Northampton, Oxford and Wilts.

Among the counties having the greatest proportion of crimes of violence is a group on or near the Welsh border—Glamorgan (far the worst of all),<sup>1</sup> Brecon, Hereford, Radnor and Salop; London comes next to Glamorgan, and the next lowest English counties are Warwick, Stafford and Lancaster. The Welsh counties Montgomery and Merioneth, which ranked so high in the case of crimes against property, are here near the bottom of the list, but Cornwall, Cardigan and Anglesey again stand near the top. It is noticeable that the northern counties of Cumberland, Northumberland, Durham and York rank much higher than they did in the previous case.

These northern counties rank higher still as regards the class of crimes against morals. Glamorgan and Radnor are again close to the bottom of the list, but Huntingdon has a still greater proportion of these crimes, and it is a striking feature that a conspicuously bad position is taken by a number of the more rural English counties, such as Berks, Hereford, Buckingham, Somerset, Lincoln, and Wilts. On the other hand, London, Warwick and Lancaster,

<sup>1</sup> It is only fair to point out that a large percentage of the prisoners convicted at Assizes and Sessions in South Wales are not Welshmen.—Ed., *L. M. & R.*

which ranked so low among the counties with most crimes of violence, now rank quite high.

Turning next to consider the figures relating to drunkenness, it may be well to remark first that these, like the other figures, only give the number of persons *proceeded against*, and so will be affected by greater or less activity on the part of the police: and whereas, for our present purposes, differences of police activity probably had little or no material effect in the case of indictable crime, it is possible that their effect on the position of some counties as regards drunkenness may be considerable. At the same time, there is good reason to believe that the distribution of drunkenness corresponds generally to the distribution of proceedings for drunkenness which is indicated by our figures.

At the head of the list come Cambridge (first by a large margin in 1904), Suffolk, Wilts, Oxford and Bedford, all with less than 200 cases per 100,000 of population. At the other end of the list are Northumberland (with 1,706 cases per 100,000 of population!), then Glamorgan, Durham and London, with proportions between 1,400 and 1,100 per 100,000 of population. The rural Welsh counties no longer hold a good position such as they had in regard to indictable crime: on the contrary, we find that of the 16 counties with the most drunkenness in 1904, no less than 8 were Welsh.

The distribution of drunkenness which is indicated by these figures, and which was particularly clearly marked in 1904, may be expressed by saying that there was least drunkenness in the strip of England extending from Norfolk and Suffolk, on the east, south-westwards to Wilts, Somerset, Cornwall and Devon; that, generally speaking, the Midland counties came next, with the counties (excluding London) to the south-east of the strip just mentioned,—no doubt the comparatively low position of the counties immediately



round London is due to their including much of "greater London;" while all the counties, save London, which had most drunkenness lie either in Wales or in the area north of the Mersey and Humber.

In conclusion, we may advert to some interesting figures which were given in the Introduction to the Criminal Statistics for 1893 and 1898, and which throw a good deal of light on this question of the distribution of crime and drunkenness in England, for they enable us to compare the criminality (measured by the proportion to population of crimes reported to the police) of different classes of population, particularly those found in seaport, mining, manufacturing and pleasure towns and agricultural districts on east and west. It clearly emerges from these figures that crimes against property tend to increase with increasing density of population, but that, of all towns, *seaports* show far the highest proportions of crime (of almost every description) and of drunkenness; that crimes against morals prevail in agricultural districts, particularly in the south and west; and that, after seaports, drunkenness is most rife in mining districts and in the north.

#### IV.--RESPONSIBILITY IN LAW.

*(Continued from page 272.)*

##### V.

**I**N all great controversies which have from time to time agitated the human mind, and in which the reason of man has marked out clearly defined opinion upon one side and another, it will generally be found that the cleavage represents different phases of the truth; and, that to the attainment of final conclusions, we have to go between and beyond them. The distinctions over which so much time and labour have been expended are seen to be no more

valid than as stepping stones along the pathway of thought, embodying opinion or belief that possesses no more than individual cogency—that is wanting in that objective reality “which is valid for the consciousness of all.”<sup>1</sup> Knowledge is a result of the unification of reason and experience;<sup>2</sup> and it is in the reconciliation of partial truths, which have obtained validity in experience, that we attain to knowledge.

In these two factors, reason and experience, we have the bases of knowledge. *Belief is the outcome of experience*<sup>3</sup>—a product of the three primitive functions of mind: it is empirical knowledge with which the mind cannot rest satisfied, and thus arises “the demand for a higher kind of knowledge to which experience is not adequate.”<sup>4</sup> *Faith is the outcome of reason*—a product of reason and conscience working upon the fruits of experience, the culmination of reason in search for the good, the beautiful and the true, the unification of subject and object in that self-consciousness which is the only reality.<sup>5</sup> Faith, then, is reasoned belief founded on experience and, on that account, is the nearest approach to certainty (short of ideas demonstratively certain) on any subject which can be arrived at in this life.<sup>6</sup> One may say, “The sun will rise to-morrow”: as an induction from experience, this is an expectation and belief which we cannot verify; but, as a deduction from reason and experience, we reach thereby a law of nature which is an article of scientific faith.<sup>7</sup> It may be said then that, by faith in the results of reason and experience, we attain to knowledge.

We come now to consider what is the nature of that

<sup>1</sup> Caird's *Essays*, Vol. II, 463, 451-5; Robertson, *Philosophy*, 97, 187, 189, 79, 85.

<sup>2</sup> *Ibid.*, 22-3, 97, 99, 188, 190.

<sup>3</sup> *Ibid.*, 89-95; Caird's *Essays*, Vol. II, 510, 465-6.

<sup>4</sup> Caird's *Essays*, Vol. II, 429, 439, 533.

<sup>5</sup> *Ibid.*, 530; Robertson, *Philosophy*, 179, 181-2; *Psychology*, 213; *Life and Matter*, 98, 81, 199; Dr. Jas. Ward, *Naturalism and Agnosticism*, Vol. II, 221-5.

<sup>6</sup> *Hebrews*, xi, 1; *Galatians*, iii, 2; v, 22.

<sup>7</sup> Robertson, *Philosophy*, 93-6, 355, 310, 344.

control which, it is generally admitted,<sup>1</sup> mind exercises over the bodily activities and which determines those activities. If the previous analysis of mind, from a psychological and a philosophical point of view, be correct: it will be evident that, in so far as our lower or animal faculties are concerned, freedom of choice can scarcely be said to exist apart from the influence of environment and the promptings of instinct and appetite; and that it is in the control of these propensities and inclinations that the higher faculties of the mind proceed towards the exercise of free will in choosing what is becoming and good and true.<sup>2</sup> It is by means of knowledge that we are able to exercise that choice. But, behind this, there is the larger question—how does life, mind, or will come to exert guidance and control over matter?<sup>3</sup> It is on an answer to this question that we shall have to rely for a fuller understanding of that freedom of the will on which the notion of moral responsibility rests.

Sir Oliver Lodge, in his remarks on “fundamental entities,”<sup>4</sup> places “life” or “mind” doubtfully in that category. But if life and mind have an existence independent of matter,<sup>5</sup> and if matter be the manifestation of mind,<sup>6</sup> then mind must transcend matter and be the primal entity—the only reality. He further maintains “that life is not a form of energy,” but “exerts guidance and control on the energy which already here exists.”<sup>7</sup> True; but whence does this guiding principle emanate: if mind without (physical) energy controls energy, whence does

<sup>1</sup> *Life and Matter*, 132, 134, 157; Mercier's *Crim. Responsibility*, 185, 187, 193-8.

<sup>2</sup> *Ibid.*, 173-8, 199; Caird's *Essays*, Vol. II, 449-51; Sully, *The Human Mind*, Vol. II, 122-3, 86; Robertson, *Philosophy*, 181-2.

<sup>3</sup> *Ibid.*, 132-4, 156-8, 160, 164-71, 171-3; Caird's *Essays*, Vol. II, 487, 468, 502, 452; Sully, *The Human Mind*, Vol. II, 212-3.

<sup>4</sup> *Life and Matter*, 103-5.

<sup>5</sup> *Ibid.*, 108-9, 112, 115, 116, 117.

<sup>6</sup> *Ibid.*, 108, 112, 120, 123, 136-7; Robertson, *Philosophy*, 91, 179; Caird's *Essays*, Vol. I, 246; Vol. II, 301, 436, 470, 531, 534; 521, 530.

<sup>7</sup> *Life and Matter*, 133-5, 164-6, 168-71.

this control spring? If mind can guide and control energy "by suitable adjustment of existing energy,"<sup>1</sup> without exerting on its own account force or energy, how do these transmutations have their origin? They must have their origin in the guiding principle, and it is not enough to say that there is interaction of opposite forces, or that "guidance of matter can be affected by a passive exertion of force without doing work."<sup>2</sup> This is no answer to the question—how mind or will acts on matter; and to the further question—what makes it occur? "The whole effort of civilization would be futile if we could not guide the powers of nature. The powers are there, else we should be helpless; but life and mind are outside these powers, and, by pre-arranging their field of action, can direct them along an organised course."<sup>3</sup> We have, then, life and mind directing the powers of nature; but we have seen that the highest manifestations of life and mind are subject to control by the higher faculties; and the guiding principle that we are in search of will be found in spiritual control.<sup>4</sup>

If it be true that life and mind guide and control matter and energy, and that mind be manifest in matter, then it would appear that mind transcends matter,<sup>5</sup> and may thus bring itself into relation with it: "a conscious being is a *universal* centre of relations; there is nothing which he, as conscious, cannot make part of his own life."<sup>6</sup> But matter is endowed with energy;<sup>7</sup> nature is essentially *not* "dead matter:" the elements, it is said, are undergoing spontaneous changes; "the energy given out in these changes was nearly a million times greater than any other change

<sup>1</sup> *Life and Matter*, 158.

<sup>2</sup> *Ibid.*, 165, 167.

<sup>3</sup> *Ibid.*, 171, 168-71, 171-3; Robertson, *Psychology*, 224, 225, 226.

<sup>4</sup> *Life and Matter*, 171, 171-3; Caird's *Essays*, Vol. II, 531; Robertson, *Psychology*, 225, 224-6.

<sup>5</sup> *Life and Matter*, 108, 116, 123; Caird's *Essays*, Vol. II, 431, 511, 513-14, 528-30, 469-70, 530-1.

<sup>6</sup> *Ibid.*, 529.

<sup>7</sup> Caird's *Essays*, Vol. II. 301, 522-6, 510, 468, 531, 532-4; *Life and Matter*, 117, 121-2.

that was known, and it was probable that similar changes occurred at a slower rate in ordinary matter.”<sup>1</sup> From what is becoming known of the so-called radio-active elements, one may imagine the atoms of the several elementary substances to be endowed with units of energy of greatly differing powers. But, whence does this endowment of matter with energy come? If energy be inherent in matter, and matter be the manifestation of mind, then energy must be manifest in mind; that is to say, we may take the manifestation of energy in respect of matter to be explainable in terms of mind as its source.<sup>2</sup> There is then a “spiritual energy which reacts upon nature,”<sup>3</sup> by which the mechanical energy of nature may be guided and controlled.<sup>4</sup>

We have now reached a point from which we may “get further towards bringing nerves and consciousness together:”<sup>5</sup> as the mind acts on matter, so will matter through the nerves and nerve centres react on mind. “We cannot move without having passive sensations along with the movement; we cannot receive passively the sensations that enter into our apprehension of objects without exerting actual movements.”<sup>6</sup> “It is *primâ facie* certain that within limits I determine the course of external things, and that this within limits determines me.”<sup>7</sup> The natural tendency in man, therefore, is to be guided mechanically along the path of his environment—his natural faculties giving him little room for choice; but the natural and the spiritual in normal man are inseparably united, and, in the development

<sup>1</sup> Lecture on “Elements which are changing,” delivered by Mr. Frederick Poddy at Glasgow University, reported in *Glasgow Herald* newspaper, 13th February, 1906, p. 9.

<sup>2</sup> Caird’s *Essays*, Vol. II, 469–70.    <sup>3</sup> *Ibid.*, 531, 507, 511, 528, 451, 431, 466.

<sup>4</sup> *Life and Matter*, 160, 171–3.

<sup>5</sup> Sully, *The Human Mind*, Vol. II, 212, 222–3, 287; Robertson, *Philosophy*, 224, 265–6, 337–8; Caird’s *Essays*, Vol. II, 468, 470.

<sup>6</sup> Robertson, *Philosophy*, 337–8.

<sup>7</sup> *Naturalism and Agnosticism*, Vol. II, 238, 237–9; Caird’s *Essays*, Vol. II, 524, 451, 447, 446–51.

of the spiritual, man becomes self-conscious and self-determined.<sup>1</sup> We have already seen the essential distinction between the natural and the spiritual to consist in the power of acquiring knowledge; and that it is in the unification of reason and experience in knowledge<sup>2</sup> that man rises to the freedom of the spirit.

We are now prepared to take one step farther in the solution of the puzzle involved in the control of life or mind over matter;<sup>3</sup> for that is the position into which the question of Responsibility ultimately resolves itself. It is by the directive power of knowledge, the generalised result of reason and experience, that mind assumes the guidance and control of matter and energy—by means of which we perform “work.”<sup>4</sup> By the term “work” we understand the exertion of energy physical or mental; but, in popular parlance, it is frequently used as synonymous with manual labour; and, in this mechanical sense, it forms the fallacious basis of “use-value” and labour-hours<sup>5</sup> upon which the modern doctrines of subversive socialism have mainly been built up. Manual labour, in this sense of manipulation of mass, is essentially mechanical, and cannot of itself be directive or economically productive.

It has been shown that faith is the accompaniment of knowledge, that knowledge without faith is bereft of reality.<sup>6</sup> The prevalent idea regarding faith is, that it pertains to the transcendental and is exercised on matters which are beyond all knowledge, but the endeavour has been made to show that faith is as intimately connected with science as it is with religion—that not one step can be taken in the foundation of scientific knowledge without the faith which reason

<sup>1</sup> Caird's *Essays*, Vol. II, 466-8, 451, 524, 531-2.

<sup>2</sup> *Ibid.*, 465-6; Erdmann, *History of Philosophy*, Vol. II, 439, 689, 691, 691-2, 699-700; Vol. III, 161-2, 300, 307, 314, 325.

<sup>3</sup> *Life and Matter*, 168-71.

<sup>4</sup> *Ibid.*, 165-6.

<sup>5</sup> Karl Marx, *Capital*, Engel's Ed., Vol. I, 5, 11, 19, 20, 29; Vol. II, Part VI, Ch. XIX.

<sup>6</sup> Caird's *Essays*, Vol. II, 419, 517, 530-1; *Life and Matter*, 94, 96, 98, 153.

and experience confer. It is through faith in knowledge, the assurance "that faith, in the exceeding grandeur of reality, shall not be confounded,"<sup>1</sup> that mind transcends matter and can mould it to its own designs.<sup>2</sup> Faith, reason, and conscience are seen at their simplest and best in childhood.<sup>3</sup> Let us contemplate the process of development in the child-mind.<sup>4</sup> At birth an infant can be said to possess power of movement or adaptive activity scarcely in excess of that possessed by plant life.<sup>5</sup> To account for the development and growth of mind, a theory of Spontaneous Activity has been advanced;<sup>6</sup> and Bain has virtually to admit<sup>7</sup> the existence of mind as a separate entity, apart from the action of the brain and nerves.<sup>8</sup> It is this separate entity, called mind, which is the source of all directive energy and activity—"the principle through which all things are and are understood."<sup>9</sup> We see it particularly active during childhood in the effort to understand and classify the experiences which crowd upon the attention: who has not noticed the eager pursuit after truth of the unfolding infantile intelligence, the marked distinction drawn between the real and the imaginative, the profundity of the childlike reasoning and questioning, and the simple faith in knowledge as that which they have come to know as known to others?<sup>10</sup> It is this simple faith in what it has come to know that is the distinguishing feature of childhood and the growth of its activities: it is the spring of action, that which

<sup>1</sup> *Life and Matter*, 98, 108, 116, 123.

<sup>2</sup> *St. Matthew's Gospel*, xvii, 20.

<sup>3</sup> *St. Luke*, xviii, 17.

<sup>4</sup> Robertson, *Psychology*, 52, 66, 50, 65, 188, 203, 113, 229, 224-5; 237-8; *Philosophy*, 147, 150, 174, 149; Caird's *Essays*, Vol. II, 489, 491; 452, 466-73.

<sup>5</sup> Robertson, *Psychology*, 225-6, 230, 236, 240, 242.

<sup>6</sup> *Ibid.*, 48, 50, 52, 56, 224-6; Bain, *Mental and Moral Science*, 14, 78, 80, 89, 322, 342, 403.

<sup>7</sup> *Ibid.*, 90, 200, 342.

<sup>8</sup> H. Charlton Bastian, M.D., *The Brain as an Organ of Mind*, 141-6.

<sup>9</sup> Caird's *Essays*, Vol. II, 489.

<sup>10</sup> Robertson, *Philosophy*, 97-8, 116, 126-9, 149, 152-3, 311-16, 337-8, 357; Caird's *Essays*, Vol. II, 429, 431, 505, 507.

sets its energies to work.<sup>1</sup> "Children cannot learn too early that personal faith is the basis of action."<sup>2</sup>

If what has been said is correct: it is knowledge which is the governing principle of a reasonable being; it is faith in that knowledge which gives the power of action; we are prepared to act on knowledge, and it is faith which gives the power.<sup>3</sup> Many of our actions, no doubt, are regulated by belief, or a feeling of probability;<sup>4</sup> but these actions are not distinguishable from those of the lower animals: "the difference between belief and knowledge depends on the possibility of verification."<sup>5</sup> There is another difference between belief and knowledge: the one is actuated by way only of intellection, feeling and conation; the other leads to action under control of the reason, the conscience and the will.<sup>6</sup>

Now, if faith in knowledge be a reality,<sup>7</sup> capable of being transformed into action, have we not within the compass of mind that "spiritual energy which reacts upon nature"<sup>8</sup> as the manifestation of reason, and as subject to its control? In exhibition of this truth faith gives utterance—"If Thou wilt, Thou canst:" and we have a presentation of the power of mind over matter in answer, "I will."<sup>9</sup> The beginnings of the will are seen in the control of bodily movement, prompted by feeling and intellection:<sup>10</sup> intellection unites feeling and conation, and "all terms of intellection imply activity": "the problem then of will or volition is to forge a link of some kind between activity and feeling;" for,

<sup>1</sup> *St. Luke*, xviii, 17; *St. Matthew*, xvii, 20.

<sup>2</sup> *Daily Mail*, 3rd May, 1906, p. 6. (Leading article—quotation from an American Writer.)

<sup>3</sup> Robertson, *Philosophy*, 86-9, 93-6; Sully, *Human Mind*, Vol. II, 287-92, 223, 211-12; Caird's *Essays*, Vol. II, 530-2.

<sup>4</sup> Robertson, *Philosophy*, 89-93.

<sup>5</sup> *Ibid.*, 93.

<sup>6</sup> *Ibid.*, 89, 90, 181-2; Robertson, *Psychology*, 222-3.

<sup>7</sup> Robertson, *Philosophy*, 91, 179.

<sup>8</sup> Caird's *Essays*, Vol. II, 551, 452, 419, 469-70. <sup>9</sup> *St. Matthew*, viii, 2, 3.

<sup>10</sup> Robertson, *Psychology*, 239, 25, 240, 236, 225-6, 240-2, 224-7, 230, 235-6; Bain's *Mental and Moral Science*, 79-81.



"there is nothing more characteristic about the beginning of life than that we are not able at will to put forth *adaptive* activity in relation to feeling." The primitive act of a child is spontaneous, that of crying; then comes the instinctive or adaptive act of taking in food, and finally the conscious repetition of these acts under laws of association and memory: in these acts we perceive the instinctive germs of the will. It has already been shown how in childhood the spiritual and moral faculties are actively at work, assimilating the teachings of experience as they crowd in upon the expanding intelligence; and how it is the simple faith in what the child has come to know as known to others, that sets its energies at work. It is knowledge, then, that forges a link between activity and feeling; and faith is the spiritual principle which in response gives power to say "I will."<sup>1</sup>

We have now reached the position: that in all matters of a spiritual or moral nature, which concern our reason and conscience and which do not concern merely our animal nature, all our activities are centred upon our knowledge. If faith in knowledge enables us to act in accordance with the higher emotions and the will, we are so far self-determined; but knowledge, in this sense, is that which is true. Your reason and your conscience enable you to know the truth, and "the truth shall make you free."<sup>2</sup> In the inevitable conflict between desire and will, between the animal and the moral faculties of man,<sup>3</sup> we are deciding for ourselves whether under the lower law of necessity we do not choose but follow the dictates of our animal propensities, or whether under the higher law of liberty we choose to follow the dictates of reason and conscience.<sup>4</sup> All men may not attain

<sup>1</sup> Robertson, *Philosophy*, 144, 146; *Psychology*, 236, 240.

<sup>2</sup> Robertson, *Psychology*, 214, 216, 213, 220, 240; *Philosophy*, 188, 190, 206, 192, 199; Caird's *Essays*, Vol. II, 417-9, 505, 463; *St. John*, viii, 32; *Romans*, viii, 2; vii, 15, 25.

<sup>3</sup> Robertson, *Psychology*, 236-7, 241-2.

<sup>4</sup> Bain's *Mental and Moral Science*, 448, 396-406; Caird's *Essays*, Vol. II, 376, 417, 421; Mill, *Logic*, 6th ed., 1865, Vol. I, 576, 578, chap. xii; Sully, *The Human Mind*, Vol. II, 292, 364.

to this freedom, but all men are subject to law; all men in the normal state may be made to understand the meaning of law and the inevitable consequences of its breach: "We are said to *recognise* beauty, truth and right."<sup>1</sup>

## VI.

In treating of the mind as ranged under lower and higher faculties, corresponding to the natural and spiritual consciousness, we have endeavoured to show mind operating on the lower plane by way of intellection, feeling and conation, and on the higher plane by way of reason of moral and æsthetic sentiment and of will.<sup>2</sup> We must now proceed to an analysis of the states of consciousness, in so far as they affect our activity, in respect of the various elements of the mind.<sup>3</sup>

If the division of the mind into states which correspond to lower and higher faculties respectively of the soul and of the spirit, to act and to feel, we shall find that a corresponding distinction is apparent in the character of our actions according to the source from which they arise—whether they be prompted by bodily wants and experiences or be controlled by reason and moral feeling.<sup>4</sup> The distinction may be expressed in an intelligible form, by saying that activity may be induced either by action *of* feeling or by action *for* feeling:<sup>5</sup> in the one case sense-feeling is the

<sup>1</sup> Robertson, *Psychology*, 213; *Philosophy*, 181-2, 127-8, 182; Sully, *The Human Mind*, Vol. II, 122-3, 86.

<sup>2</sup> *Ibid.*, 124, 133, 155, 327.

<sup>3</sup> Robertson, *Psychology*, 219-26, 227-36, 237-46, 247-51; Sully, *The Human Mind*, Vol. II, 172, 179, 181, 196, 209, 224, 234, 286, 292.

<sup>4</sup> Robertson, *Philosophy*, 208-9, 221, 310; Myers, *Human Personality*, Vol. I, 14, 15, 72, 102, 118, 97, 157, 169, 193, 224, 226; Vol. II, 1, 81, 193, 197, &c.; *St. Matthew*, xxvi, 38; *St. Luke*, xxiii, 46; *Hebrews*, iv, 12.

<sup>5</sup> Robertson, *Psychology*, 219, 222, 227, 237, 238-9, 241, 247; *Philosophy*, 186, 194, 144, 191, 195, 197.

<sup>6</sup> Bain, *Mental and Moral Science*, 218, 347; Robertson, *Psychology*, 240, 230, 250; *Philosophy*, p. 88; Sully, *The Human Mind*, Vol. I, 66, 69; Vol. II, 180-1, 190, 197, 222, 235-41, 258, 275.

predominant element ; in the other case, the higher emotions come after, and are excited by intellectual elements. Impulse is transformed into rational motive,<sup>1</sup> conflict of impulse into control,<sup>2</sup>—the opposition of a lower, to a higher “gives place to a new and larger consciousness of a united self.”<sup>3</sup>

In treating of the phenomena of mental and bodily activity, we have to do with conation and volition.<sup>4</sup> In consciousness there will always be found an element of feeling, an element of intellection, and an element of will.<sup>5</sup> Now, if it be true that “you will always find an element of feeling involved in conation, together with intellectual representation,<sup>6</sup> it will follow that the distinction commonly drawn between voluntary and involuntary action is one of degree only;<sup>7</sup> and the like must be said of conscious and unconscious activity. “The difference between a reflex action and a simple conscious act is only one of degree of complexity.”<sup>8</sup> When, therefore, it is said by the same author, that “reflex action is like spontaneous action, not only involuntary but also unconscious,”<sup>9</sup> one may rely on this to be qualified by the previous statement, and our knowledge in terms of the caution, to “be not misled by a seemingly sharp contradiction between conscious and unconscious experience: the fact is . . . there are all degrees of consciousness from the fully conscious down to the sub-conscious.”<sup>10</sup> When, therefore, Professor Sully, in discussing the range of conative phenomena,<sup>11</sup> lays it down as certain, that “no actions of the organism which are carried out *unconsciously* can fall under the head of conation,” the

<sup>1</sup> Sully, *The Human Mind*, Vol. II, 239, 246, 258, 264, 263-6.

<sup>2</sup> *Ibid.*, 246, 253, 263-5.

<sup>3</sup> *Ibid.*, 264, 286, 292.

<sup>4</sup> Robertson, *Psychology*, 84, 86-7, 219-22 ; Sully, *The Human Mind*, Vol. II, 172-3, 179, 195 ; Bain, *Mental and Moral Science*, 318.

<sup>5</sup> Robertson, *Psychology*, 23, 25, 96, 47, 219-20 ; Sully, *The Human Mind*, Vol. I, 68-9.

<sup>6</sup> Robertson, *Psychology*, 220, 35, 42, 44.

<sup>7</sup> Robertson, *Psychology*, 43, 35, 42, 44, 47, 41, 227.

<sup>8</sup> *Ibid.*, 43.

<sup>9</sup> *Ibid.*, 227.

<sup>10</sup> *Ibid.*, 44, 149, 260, 258.

<sup>11</sup> *The Human Mind*, Vol. II, 172-3.

correctness of the statement will depend, not only on the definition which you may give to "mind,"<sup>1</sup> but also, on the correlation which you may conceive to subsist between body and soul on the one hand and spirit on the other. The question may be presented in this form: can a sentient being experience bodily movement apart from any mental concomitant; does activity always imply an element of conation; is there such a thing as random movement of the living organism? To answer these questions, we must take into consideration all the forms of activity which are peculiar to the human system.<sup>2</sup> At one end of the scale, we find a series of movements which have been described as mechanical, but which are really controlled by feeling; and, at the other end, we have a range of action in which the developed will, in conjunction with reason and moral sentiment, exercises control.<sup>3</sup> There is a measure of apparent uncertainty in action induced by feeling; for, in perception, besides "physical conditions over which we have no control," there are psychological conditions which depend on the attention which we give to the sense-impression or feeling.<sup>4</sup> It is apparent that where action is consequent on the influence exerted by sense-impression or suggestion, the mind, however apparently free to act, is determined by laws no higher than those governing the animal organisation. If what has previously been said, regarding the interaction of mind and matter, be correct, there is the highest degree of probability for the assumption that the so-called spontaneous random or automatic movements<sup>5</sup> which are common to animal life do not occur without the initiation of some mental impress; that if it be true in fact, to say,

<sup>1</sup> Robertson, *Psychology*, 256, 261, 259, 7, 8, 15, 138-9, 185, 187, 193, 56, 188.

<sup>2</sup> *Ibid.*, 222, 224, 227, 230, 232, 237, 240; Sully, *The Human Mind*, Vol. II, 181, 182, 184, 189, 195.

<sup>3</sup> Robertson, *Psychology*, 232, 237, 240, 241; Sully, *The Human Mind*, 235, 192, 17, 185, 188.

<sup>4</sup> Robertson, *Psychology*, 146-54.

<sup>5</sup> *Ibid.*, 222, 224, 227, 230, 232, 261, 34; Sully, *The Human Mind*, Vol. II, 181, 184.

that "with every psychosis is concomitant a neurosis," it should be equally true to say, that with every neurosis there is concomitant a psychosis of the living subject.<sup>1</sup>

The consideration of the forms of activity, generally classed under the heads of voluntary and involuntary movement, has led us in the first place to distinguish between mind and consciousness, and in the second place to recognise varying degrees of consciousness:<sup>2</sup> "mind . . . and consciousness . . . are not at all commensurate terms;"<sup>3</sup> and "activity may go on in the mind without being consciously recognised; there is sub-conscious, there may be unconscious, mental activity;"<sup>4</sup> all forms of activity of the human system, involuntary or voluntary, "all are covered by the term conation."<sup>5</sup>

In treating, then, of outward acts or manifestations of the will, which may be productive of legal consequences<sup>6</sup> it is important to observe, that the law may have to take cognizance of acts ranging through all degrees of consciousness, voluntary or involuntary; and this becomes apparent when we consider how readily voluntary action may pass into involuntary action.<sup>7</sup> Actions originally voluntary may become involuntary through force of habit or by lack of attention,<sup>8</sup> and may thus very easily pass from conscious to unconscious or sub-conscious states.<sup>9</sup> But, so far as accountability for conduct is concerned, it is generally held to be with acts consciously performed that the law has to do.<sup>10</sup>

Having so far traced these "lower and higher forms of psychosis"<sup>11</sup> through intellectual and active processes, we

<sup>1</sup> Robertson, *Psychology*, 35, 41, 222.    <sup>2</sup> *Ibid.*, 223, 256, 261, 149, 40, 42, 258.

<sup>3</sup> *Ibid.*, 256, 261.

<sup>4</sup> *Ibid.*, 149.

<sup>5</sup> *Ibid.*, 222.

<sup>6</sup> Holland, *Jurisprudence*, Chap. viii.

<sup>7</sup> Robertson, *Psychology*, 223-4.

<sup>8</sup> Robertson, *Psychology*, 232, 247.    <sup>9</sup> Sully, *The Human Mind*, Vol. I, 74-5.

<sup>10</sup> *Law Quarterly Review*, Vol. XVIII, No. 69, p. 26. Article on "Lunacy in Relation to Contract Tort and Crime."

<sup>11</sup> Sully, *The Human Mind*, Vol. I, 69, 70, 74.

now turn to the corresponding stages of development which may be observed in the case of feeling. Here again we shall find the distinction between the lower and the higher properties of the mind to be clearly marked.<sup>1</sup> Marking off, first of all, the sense-feelings from the emotions—that is to say, the “bodily” from the “mental” experiences; we come to a classification of emotive states in which the purely animal reactions of joy and grief, together with the more specialised instinctive animal reactions, may be readily distinguished from the higher human feelings which have their final development in the moral and religious sentiment.<sup>2</sup> Even as we have seen reason and self-consciousness come in to direct the processes of simple intellection, and will under the direction of rational motive to control the promptings of conative impulse, so we now see conscience as the outcome of moral consciousness come in to govern the ordinary sense-feelings and emotions.<sup>3</sup>

The conditions, under which Freedom or Free Will can be exercised, become now at once apparent.<sup>4</sup> We have seen that man, in respect of his lower faculties, is under a law of necessity—the law of nature; but that, in respect of his higher faculties, he may place himself under a higher law—that of his spiritual consciousness, whereby he transcends the law of nature: “behind the freedom that breaks the bonds of nature and necessity, we find a divine necessity, in union with which alone man can be truly free.”<sup>5</sup> In the exercise of reason and conscience, man is lifted up “into a wider consciousness of which his mind and will may become the organ,” and reaches

<sup>1</sup> Sully, *The Human Mind*, Vol. II, 46-7, 47, 56, 82-7, 88, 90, 106, 122, 124, 133, 155, 167.      <sup>2</sup> *Ibid.*, 84-6, 106, 122, 155, 169.

<sup>3</sup> *Ibid.*, Vol. I, 434, 457, 475; Vol. II, 238-9, 264, 160, 165-6, 168-9, 46-7, 286-7, 292, 266, 268, 271, 274.

<sup>4</sup> Caird, *The Critical Philosophy of Immanuel Kant*, Vol. II, 241-75, 317, 377, 419, 620-9; Sully, *The Human Mind*, Vol. II, 286, 292, 364; Robertson, *Philosophy*, 136, 192, 353.

<sup>5</sup> Caird, *The Critical Philosophy of Kant*, Vol. II, 629.

“that freedom of spirit which counts all the burdens of others its own.<sup>1</sup> To be free is to be in touch with the Infinite: we may obtain freedom here only by helping others to be free—in the declared will of God, “Thou shalt love thy neighbour as thyself.”<sup>2</sup> It is in this spirit that man must proceed before he is qualified to mete out responsibility and punishment. In a rightly organised society, no one can be justly considered solely responsible for his evil tendencies;<sup>3</sup> for, while evil exists in a community, there must be contributing circumstances for which all more or less are responsible. We have already seen, how, under an adequate perception of the essential properties of law and the consequences of its breach, the State must in every case be held ultimately responsible for its due observance: and, when we come to see how great are the variations of different minds in respect of stages of development and of psychical capacity,<sup>4</sup> and how it is by the development of the higher faculties alone that a blind necessity of following the instinctive promptings of the animal nature can give place to the dictates of reason and morality in the consideration of self and others, we shall come to see that the question of Responsibility is not to be decided simply in the award or withholding of punishment, but carries with it far-reaching considerations of social amelioration—the raising of those that are cast down.

We have now to contemplate man as the possessor of a mind constituted of lower and higher faculties, which correspond to the duality in unity of soul and body on the one side and of spirit on the other. When the growth of mind under this unity is disturbed, either by the arrest of development or disease on the one side or by eccentric

<sup>1</sup> Caird, *The Critical Philosophy of Kant*, 620-5.

<sup>2</sup> *St. Matthew*, xxii, 39; *Romans*, xiii, 9; *Galatians*, v, 14; *St. James*, ii, 8.

<sup>3</sup> Caird, *The Critical Philosophy of Kant*, 622, 620, 622-5.

<sup>4</sup> *The Human Mind*, Vol. II, 299, 302.

development or alien possession on the other, the state is abnormal.<sup>1</sup> For the complete explanation of an abnormal state of mind we shall have to look in one or other of two directions—when on the one hand the brain as the organ of the mind is either defective or diseased, or when on the other hand there is a cleavage of the personality, and morbid or alien influences have taken possession.<sup>2</sup> The tests which we shall have to apply in each case are different: in the former case, the test of knowledge will be sufficient; in the latter case, the only effective test will be that of the power of control.<sup>3</sup> When we apply the test of knowledge, we must understand what knowledge in this regard implies—it implies “that knowledge which is valid for the consciousness of all,”<sup>4</sup> in the possession of which there is freedom to choose between the right and the wrong: when we apply the test of the power of control, we must understand this to involve that guidance and control of mind over matter, that spiritual control of the higher over the lower faculties, which leads to action under the guidance of the reason, the conscience and the will. In these tests thus applied, we should discover the workings of a fully responsible and developed type of mind; but this “is an ideal never perfectly realised:”<sup>5</sup> and we must regard man as in a condition practically of divided responsibility, in which the community must be content to bear a share of the burden of the individual.<sup>6</sup> We must be prepared, therefore, to contemplate Responsibility as essentially a question of degree, and to recognise that to attempt the imposition of any hard and fast line of separation between

<sup>1</sup> Sully, *The Human Mind*, Vol. II, 299—301.

<sup>2</sup> Myers, *Human Personality*, Vol. I, 40-1, 51, 59, 177; Mercier, *Criminal Responsibility*, 131-2, 136, 138-40.

<sup>3</sup> Stephen, *History of the Criminal Law*, Vol. II, Chap. ix; *Digest of the Criminal Law*, Article XXVII; Mercier, *Criminal Responsibility*, 182, 184-5, 193-5.

<sup>4</sup> Robertson, *Philosophy*, 97.

<sup>5</sup> Sully, *The Human Mind*, Vol. II, 299.

<sup>6</sup> Caird, *The Critical Philosophy of Kant*, Vol. II, 622-5.



responsibility and irresponsibility is futile:<sup>1</sup> all that can be done is to impose certain rough and ready tests which may be found practically useful.

There are three well understood states of the mind which have the tendency to produce a greater or less incapacity for taking a rational view of conduct—these are negligence, degeneracy (depravity) and insanity, showing downward grades of departure from the normal type of mind. We shall find these different grades of departure from the normal exemplified in the commission of wrongful acts.

It appears to be practicable to treat of insanity under two main divisions<sup>2</sup>—those characterised respectively by dementia and by mania; for, although delusion may be found to permeate nearly all cases of insanity that appear before the Courts, there seems to be a clear distinction between the alternating phases of delusion to be found in most cases of disease of the brain and those *idées fixes* which are characteristic of some cases of possession.<sup>3</sup> The distinction seems to be recognised by usage, in popular language, of the terms “unsound mind” on the one hand and “mad” on the other, as representing differing phases of insanity. In order to apply the epithet: in the former case, we look for some disease of the brain, or general decay, to justify its application; but, in the latter case, there can be few men or women who at one time or other have not been led, under “temporary perversions of the feelings and will”<sup>4</sup> unguided by reason and experience, to do something essentially mad: on such a state of things becoming persistent, the man is in a position to become possessed (obsessed). “There are times in all our lives when we do mad things, and wonder afterwards what possessed us.” These phases no doubt will frequently be found in combination, as in some forms of

<sup>1</sup> Mercier, *Criminal Responsibility*, 203; Sully, *The Human Mind*, Vol. II, 311.

<sup>2</sup> Mercier, *Criminal Responsibility*, 97, 191.

<sup>3</sup> *Ibid.*, 131–3, 139, 177; Sully, *The Human Mind*, Vol. II, 319–322.

<sup>4</sup> Sully, *The Human Mind*, Vol. II, 313, 311–3.

epilepsy. It will be found possible, it is conceived, to place the more recondite phases of alleged insanity—impulsive moral emotional—under one or other of these divisions: in that direction, it is thought, lies the solution of some of the difficulties which beset a reconciliation of the differing views of the legal and medical professions on this subject.

It remains now only to make some practical application, of the principles here enunciated, in the several departments of contract, tort and crime—paying particular attention to the region of abnormality in relation to crime, and discussing again the much discussed subject of the Answers of the Judges to the Questions put to them by the House of Lords in 1843.

RANKINE WILSON.

(*To be continued.*)

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## V.—THE PROVINCE OF THE JUDGE AND OF THE JURY.

(*Continued from page 315.*)

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### LILBURN'S TRIAL IN 1653.

**I**F further proof were needed that the determining factor in Lilburn's acquittal in 1649 was his assertion that the jury were judges of law as well as of fact, it is to be found in this. Very soon after his acquittal a medal was struck to commemorate the event. A copy of this medal is given on the frontispiece to the first edition of *Lilburn's Tryal*, which may be seen in the British Museum.<sup>1</sup> It bears on the obverse a portrait of Lilburn, with this in-

<sup>1</sup> C. 37, d. 51 (5).

scription: "John Lilborne, saved by the power of the Lord and the integrity of his Jury, *who are Judges of law as wel (sic) as of Fact.* Oct: 26 . 1649." On the reverse are given the names of the jurors. That Lilburn was the first to assert this doctrine is shown by the words of Judge Jermyn, quoted above: "You have broached an erroneous opinion."<sup>1</sup> It might indeed be called the Lilburnian heresy. We have seen how well this doctrine served him in 1649. Let us see what use he made of it at his trial in 1653.

For the next two years of his life (after 1649) Lilburn remained, as regards politics, very quiet. In December, 1649, he was elected a Common Councilman of the City of London, but took the required declaration with a qualification. His evasion was reported to Parliament by the Lord Mayor and Aldermen, and on the 26th of December the Parliament quashed his election. Even this did not arouse him to break the restraint that he had imposed upon himself.

On the 22nd of December, 1648, he had obtained an ordinance granting him £3,000 as compensation for his sufferings at the hands of the Court of the Star Chamber, and the money was made payable out of the forfeited estates of certain Royalists in the County of Durham. This source, however, proved insufficient, and on the 30th of June, 1650, by the aid of Cromwell, who appears to have been favourably disposed towards him by his abstention from politics, he obtained another ordinance charging the remainder of the sum on the confiscated lands of the Chapter of Durham Cathedral. Indeed for a short time Cromwell and Lilburn were the best of friends. They even embraced each other in public. In December, 1651, they had a long and friendly conversation and all the causes of their former quarrel appeared to have been forgotten.<sup>2</sup>

Professor Firth observes: "Now that his own grievances were redressed he undertook to redress those of other

<sup>1</sup> *Vide* May No., p. 304.

<sup>2</sup> *Gardiner*, Vol. II, p. 7.

people." About this time he seems to have practised as a sort of unqualified barrister.

In *Lilburn Tried and Cast* (p. 83) we are told: "Now howsoever for a while, hee made this his Trade, to get what he could by pleading at the Committees," *i.e.*, the Committees appointed for compounding with the Delinquents (Royalists) for their estates—"Neverthelesse, having been so long vers'd in Nationall Tumults and Disturbances he was here as a Fish out of the Water, until he had his hand again in some publick commotions."

He begins his own account of his trial in 1653, to be mentioned presently, with these words: "I was Counsel or Proctor for my uncle, George Lilburne, esq., and one Mr. Josiah Primate;" and after speaking of the Petition to Parliament, preferred on the 23rd of December, 1651, he says: "In the delivering and management of which I appeared, as by the declared law of England I might justifiably do." What "the declared law of England" here referred to was, I do not know. He was never called to the Bar. The practice as an advocate which he had during this period of his life, no doubt stood him in good stead when he came to take his trial in 1653.

The truce between Lilburn and Cromwell did not last long. "Lilburn would have changed his nature," says Professor Gardiner, "if he had remained long without giving fresh provocation." Amongst those who had grievances against the Commonwealth was his uncle, George Lilburn, who claimed, along with George Gray, to be interested in the lease of certain "Cole-mines" at Harraton, in the county of Durham, said to be worth £5,000 a-year. He derived his title through "one Mr. Josiah Primate, Citizen and Leather Seller, of London." Primate's title, however, was disputed by one "Thomas Wray of Beanish, in the County of Durham, Esquire," who was a Papist, a Recusant, and a Delinquent. If this claim of Wray's was

good the collieries clearly belonged to the State, and accordingly the Sequestrators for the County of Durham had seized the property, and on the 25th of February, 1650-1, their action was approved by four members of the General Committee for Compounding. Lilburn now took up the matter on his uncle's behalf, and on July 30th, 1651, he issued a pamphlet entitled *A just Reproof to Haberdashers' Hall, Or An Epistle written by Lieut-Colonel John Lilburn to foure of the Commissioners*. In this pamphlet he supported his uncle's claim, and blamed Sir Arthur Hazlerigg for having used his personal influence to bring about a miscarriage of justice and to extract an unjust decision from the Committee. He charged the Commissioners with "captivating their understanding to the tyranical will of Sir Arth: Hazlerig, who hath most unjustly endeavoured a long time together the extirpation of the Familie of the said Jo: Lilburn." In the same pamphlet he speaks of Hazlerigg and the Commissioners as "unjust and unworthy men, fit to be spewed out of all human Society, and deserving worse than to be hanged."

As a result of this pamphlet the matter seems to have been reviewed, and on the 12th of December, 1651, six Commissioners (including the four who had made the previous order) reaffirmed the decision above stated. Thereupon Lilburn "penned and printed a Petition and Appeale against the Judgement and Resolution of the Commissioners for Compounding." This Petition, signed only by Josiah Primate, was presented to Parliament (the Rump) on the 23rd of December, 1651; but copies of it had been given to several members before it was formally presented. It was addressed to the "Supream Authority of this Nation, the Parliament of the Commonwealth of England," and after setting out the facts of the case on which Primate relied, it made a virulent attack upon Sir Arthur Hazlerigg, accusing him of corruptly inter-

fering with the course of justice, and using his power and influence to injure the Petitioners. The exact terms of the Petition are given in *Lilburn Tryed and Cast*, pp. 13 and 14.

The prayer of the Petition was that Parliament would "cause the truth of the Premises to be speedily examined, and to provide for your Petitioners' relief from the Oppression and Tyranny of the said Sir Arthur Hazlerig (*sic*), and for the Dispensation of Justice without feare or favour, as to your wisdomes' shall seem most safe."<sup>1</sup>

Parliament thereupon appointed a Committee, consisting of fifty members, with power to "examine upon oath and send for persons, parties, witnesses, and papers, and make a report forthwith." This Committee sat twelve days, "examined Witnesses produced on both sides, and heard whatsoever could be said," and made their report to Parliament. The whole House (the Rump) then, "after long and solemn debate," on January 15th, 1651-2, passed certain Resolutions. These Resolutions, or Votes, are set out *verbatim* in Howell's *State Trials*.<sup>2</sup> The short effect of them was to fine Lilburn £7,000, and banish him from the country, upon pain of death if he returned.

It is not our business to enquire into the validity of the claim to these collieries made by George Lilburn and George Gray, through Josiah Primate. But this observation strikes us at once. No more unfit tribunal to investigate a complicated question of title to real property could possibly be imagined than a Committee of fifty members of the Rump Parliament. One would think that the Court of Chancery was the proper tribunal to try such a case; and, as a matter of fact, the case had already been before that Court; but the four Commissioners, in their Order of 27th February, 1650-1, had said: "That we cannot admit of the Depositions or Affidavits taken in Chancery in this Case as evidence before

<sup>1</sup> *Lilburn Tryed and Cast*, p. 15.

<sup>2</sup> Vol. V, p. 408.

us." The Court of Chancery was still in existence. It was not until the 5th of August, 1653, that its abolition was voted, by a House "to which not a practising lawyer had been admitted;"<sup>1</sup> but it was unpopular and its delays were notorious. Yet it was by such a House (which did not contain amongst its members a single practising lawyer) that this difficult question of law and evidence was decided. It must not, however, be forgotten that it was the tribunal which Primate and Lilburn had themselves selected. There is no doubt also that Hazlerigg was Lilburn's bitter enemy. He had probably neither forgotten nor forgiven the pamphlet which Lilburn had written against him just before his trial in 1649,<sup>2</sup> and Lilburn could expect but scant justice in that quarter. Independently of the merits of Primate's case, however, the truth appears to be, as Professor Gardiner says, Parliament was "no doubt delighted at the opportunity of getting rid of a fire-brand," and "took occasion from the intemperance of the language used in the petition to treat it as a libel on Hazlerigg."<sup>3</sup> He was ostensibly punished for breach of privilege, but the real object of Parliament was to get rid of him in any way it could. The fact remains that Parliament had acted as judge in its own cause, and had condemned Lilburn without giving him any opportunity of being heard in his own defence. Cromwell, "vexed at the recurrence of turbulence on Lilburn's part, gave vent to his passions at the expense of consistency" and himself prescribed the sentence.

On the morning of the 20th of January Lilburn attended at the House and endeavoured to address it. He was commanded by the Speaker to kneel, in answer to which he said: ". . . Sir, to be short with you, I neither can kneel, nor will I kneel." He was then ordered to withdraw, and

<sup>1</sup> Gardiner, Vol. II, p. 241.

<sup>2</sup> *A Preparative to a Hue and Cry after Sir Arthur Hazlerigg*; published September 13th, 1649.

<sup>3</sup> *Hist. Commonwealth*, Vol. II, pp. 7 and 8.

he withdrew accordingly.<sup>1</sup> No judgment or sentence was therefore ever passed upon him in his presence.

For his contumacy in thus refusing to kneel ten days were taken off the time allowed him in which to get out of the country.

In spite of the impending penalty Lilburn was in no hurry to leave England, and it was not until January 29th, 1651-2, that, "accompanied with great store of friends on horse-back," who rode through London and Southwark with him, he set out for Dover, where he arrived the next day, and after some difficulty with the officers of the Custom House there, about a pass, crossed to Ostend and proceeded to Amsterdam, where he arrived on the 8th February (1651-2).

#### THE ACT OF BANISHMENT.

A few days after his arrival at Amsterdam he received a printed copy of an Act of Parliament, entitled: "An Act for the Execution of a Judgment given in Parliament against Lieut.-Col. John Lilburne," dated the 30th January, 1651-2, which embodied the resolutions above mentioned.

The Act began by reciting—

"Whereas, upon the 15th day of January in the year of our Lord 1651-2 a judgment was given in Parliament against the said lieut.-col. John Lilburne, for high crimes and misdemeanours by him committed, relating to a false, malicious, and scandalous Petition heretofore presented to the parliament by one Josiah Primate of London, Leatherseller, as by the due proceedings had upon the said Petition, and the Judgment thereupon given at large appeareth; be it therefore enacted by this present parliament and by the authority of the same,"<sup>2</sup>  
etc. . . . .

After a short stay in Amsterdam he went to Bruges, where he appears to have opened negotiations with the Royalists, or at least to have lived on good terms with them. "But while we may admit that he mixed in Royalist circles, there is no real evidence that he ever plotted to restore the king."<sup>3</sup>

<sup>1</sup> *St. Tr.*, Vol. V, p. 409.

<sup>2</sup> The Act is set out at length in the *State Trials*, Vol. V, p. 414.

<sup>3</sup> Gooch, p. 253.



He is reported to have made a foolish boast that if they would give him £10,000 he would destroy Cromwell, the Parliament, and the Council of State, and settle Charles Stuart ("King of England, as he called himself") on his throne in England.

The Rump Parliament was summarily dismissed by Cromwell on April 25th, 1653. There can be no doubt that it was hopelessly corrupt and thoroughly deserved its fate. One member, Alderman Allen, owed the State £700,000, an enormous sum of money in those days. Lilburn, as soon as he heard of its dissolution, petitioned Cromwell for leave to return to England. Receiving no reply, he returned, arriving in London on June 14th, 1653, and on the 15th was apprehended and committed to Newgate to await his trial.

He seems to have thought that the Act of Banishment came to an end, and ceased to have any effect, after the dissolution of the Rump Parliament.<sup>1</sup> But in *Streater's Case* it was a mere Order of Parliament; in *Lilburn's Case* it was an Act.

His return was very inopportune for Cromwell and his Council of Officers, who, having got rid of the pretence of a Parliament, were about to throw off the cloak and openly constitute themselves a military oligarchy. But "Lilburne was once more in England," says Professor Gardiner, "and it was certain that wherever Lilburne could raise his voice, no institution, resting on the power of the sword, would escape unchallenged."<sup>2</sup>

He petitioned Cromwell and the Council of State for leave to remain unmolested, and assured them of his intention to live peaceably, excusing the former wildness of his language on the ground of his passionate temper. The petition was unanswered, and the Attorney-General was directed to prosecute him, under the said Act of January

<sup>1</sup> *St. Tr.*, Vol. V, 366; and Gardiner, Vol. II, p. 314.

<sup>2</sup> *Hist. Commonwealth*, Vol. II, p. 24.

30th, 1651-2. "It is probable," says Professor Gardiner, "that Cromwell and the Council of State took this step in a moment of irritation," and that "Cromwell was, more than most men then living, apt to underestimate the constitutional strength of Lilburn's position. He had soon to learn that there was a side of the question on which he had failed to reckon."<sup>1</sup> In a second petition Lilburn "denied the right of the late Parliament to sentence him to death by an *ex post facto* enactment, for his part in presenting the petition which was condemned by no law, and that, too, without hearing him in his own defence. If this were to stand as a precedent, every Englishman would be at the mercy of the Government of the day. Lilburn's appeal was the more telling as Cromwell and those who acted with him made a strong point against the late Parliament of its readiness to interfere in matters which ought to have been left to the law."<sup>2</sup> All that he could extract from Cromwell was a promise that he should have a fair trial.

His friends gave him up for lost, and indeed he seemed to have run his head into the noose by his ill-advised return to England. Mr. Gooch says: "The general impression was that he had at last 'brought his neck into the noose' and would be hanged."

#### THE TRIAL: POPULAR EXCITEMENT.

The trial was at first fixed for the 21st June, 1653, but as a result of a third petition it was put off until the new Supreme Authority (Parliament) had assembled. He was brought to the bar at the Old Bailey on July 13th, 1653. Before the Sessions began he petitioned the new Parliament, but no notice was taken of his petition.

"Lilburn's hold upon the people," says Mr. Gooch, "was found to be as great as ever. The trial provoked extraordinary excitement. Twenty citizens offered bail of £2,000

<sup>1</sup> *Hist. Commonwealth*, Vol. II, p. 244.

<sup>2</sup> *Ibid.*, Vol. II, p. 245.

each. To a judge's remark that he (Lilburn) would be executed; it was replied that it would be the bloodiest day England had ever seen. During the trial three regiments stood under arms and six or seven thousand citizens were estimated to be present, many of them armed. The crucial nature of the struggle was obvious even to foreigners."

Speaking of this trial, Professor Firth says: "Throughout the trial popular sympathy was on his side. Petitions on his behalf were presented to Parliament so strongly worded that the petitioners were committed to prison."

The only account of the trial that we possess is one "written (the chief part) by the said John Lilburn" himself, contained in Vol. V of the *State Trials*, 407—443. It is only a fragment, and bears internal evidence of the work of another hand, referred to therein as "the penman." Unfortunately it does not help us much, as it stops short before Lilburn pleaded and the jury was sworn.

#### THE JUDGES.

The Court consisted of "The Right Hon. Lord Chief Baron Wylde and the rest of the Honourable Bench for the Gaol Delivery of the Old Bailey." It was, in fact, the ordinary Sessions for the City of London. Of how many judges the Court was composed we do not exactly know, but besides the Lord Chief Baron there were present Judge Warburton, the Lord Mayor of London, the Recorder, and at least one Alderman. The Lord Chief Baron took but a small part in the trial, and does not appear to have sat after the second day. The Recorder, Mr. Steele, took by far the most active part in the proceedings.

As usual, there were several sharp passages of arms between Lilburn and the judges. Thus on the first day of the trial, "Judge Warburton, with some heat, falls upon the prisoner, and undervalues the works of that learned man in the law of England, Sir Edward Coke, and the

Parliament's Orders, that had caused the second, third, and fourth parts of his *Institutes* to be printed; and highly extols the absoluteness of parliaments. Upon which the prisoner at the bar replies with a great deal of zeal, earnestness, understanding and length of time."<sup>1</sup> Throughout the whole trial he was constantly at cross purposes with the Recorder. Probably there were some other judges present, whose names are not given in the report, as they took no active part in the proceedings.

Nothing whatever is said about the Grand Jury, so we assume that a true bill was found in due course.

The Petty Jury was not empannelled until August 20th, 1653. More will be said about it hereafter.

#### THE COUNSEL FOR THE PROSECUTION.

For the prosecution his old opponent, the Attorney-General, Mr. Prideaux, appeared. On the third day of the trial, we are told, "Mr. Attorney-General Prideaux was very busy to hold the prisoner to questions to ensnare himself, as whether he was that John Lilburn meant and intended in the Indictment, and Act, or no, and to stave him off from pursuing his just demand of Oyer; which the prisoner perceiving, falls upon the said Mr. Prideaux."

Mr. Prideaux was assisted by a Mr. Hall, whose appearance on the scene is described very dramatically, if the result of it was not very effective.

#### THE COUNSEL FOR THE PRISONER.

Several members of the Bar were assigned to be "of counsel" to the prisoner by an Order of Court of the 16th July, 1653; but his Exceptions were signed by only two of them, viz., Mr. John Maynard and Mr. John Norbury. It must, however, be borne in mind that they were not

<sup>1</sup> *S. Tr.*, Vol. V, p. 417.

assigned to him to act generally as counsel do now, but only "to perfect his plea in law," *i. e.*, to advise him as to the validity of the Indictment in point of form and law, and deliver Exceptions thereto, under their hands. It was not until 1836 that prisoners charged with felony were allowed to be fully defended by counsel, but for sometime before then counsel had been allowed, as a favour, to cross-examine the witnesses for the prosecution.

#### THE INDICTMENT.

The beginning ran as follows :—

"*London, ss.* The Jurors for the Keepers of the Liberty of England, by authority of Parliament, upon their Oaths do present," &c. This is interesting, as showing the form of an Indictment during the Commonwealth. It recited the Act of Parliament of January 30th, 1651-2, and stated that the said John Lilburn "was found and was feloniously remaining within England." The Indictment<sup>1</sup> was not a long one, but it was very loosely drawn and full of slips and faults, of which Lilburn and his advisers took full advantage.

The trial began on the 13th of July, and was continued on the 14th, 15th, and 16th. "The incidents of the present trial," says Mr. Gooch, "were very much like those of the former." Speaking of this trial, Professor Firth says: "He contested every step with the greatest pertinacity." From the first Lilburn employed all his old tactics. He refused to plead, and there was "a large dispute between the Court and him upon that point." The report of the proceedings on these four days in fact consists of one long wrangle and is full of "furious hurly-burlies," as Lilburn himself describes them. "The Court being in a great heat and rage." "Mr. Lilburn endeavouring to reply, the Court over and over, again and again, interrupted him." "The Court with

<sup>1</sup> *St. Tr.*, Vol. V, p. 419.

violence and fury interrupting and silencing him." It would, therefore, not be an easy task to give a clear and connected account of these proceedings, and fortunately it is not necessary for us to do so, as they fall under the four following heads:—

- (a) The prisoner's demand for a copy of the Indictment ;
- (b) His demand to have Counsel assigned to him ;
- (c) His demand of Oyer ; and
- (d) His Exceptions to the Indictment :

from which it will be seen that they are immaterial to our present purpose.

As to the Exceptions, we must say that they strike us from a strictly legal point of view as unanswerable, and we venture to think that the Indictment ought to have been quashed. Assuming that it was drawn by Mr. Prideaux, or even settled by him (as it probably was), it only demonstrates the inexpediency of letting a Chancery barrister draw, or settle, an Indictment. That it was not quashed is the more remarkable considering the strictness with which Indictments were formerly regarded. The Exceptions show that none of the usual preliminaries or requirements of a trial at Common law had been observed before Lilburn was banished. He had been condemned by Parliament (the Rump), for a crime unknown to the Common law, and without having been heard in his defence. In ordinary circumstances this would have been intolerable. But neither the times nor the circumstances were ordinary. There had been a Revolution, and the Revolutionary party was in the ascendant. A normal test cannot be applied to an abnormal condition of affairs. We are therefore thrown back upon the view previously expressed, viz., that in the Austinian sense of law Cromwell and his party were for the time being the supreme power

in the State, and could make what laws they pleased and administer them as they thought fit. Yet even then it might be expected that they, being "godly men," "of the number of the elect" (holding and, we believe, sincerely holding, strong religious views), would observe the elementary principles of justice and fair play. It is but another instance of the way in which even good men may allow their minds and actions to be warped by passion and party. They were determined to hang Lilburn, and hang him they would, if only the petty jury ("the jury of life and death"), would let them. Hence the Exceptions were rejected and over-ruled.

What the ultimate fate of these Exceptions was we can only conjecture, since we have no actual record. All we can say is that they, as well as the demand for Oyer, must have been over-ruled by the Court, as the trial proceeded and the case went to the jury.

Eventually the Recorder, after expressing his surprise that Mr. Maynard should have signed the Exceptions, said: "For if this very first Exception of Mr. Lilburn's be good in law, then all the late Acts of Parliament are totally invalidated, as well as that which he speaks against." Then the Court broke up.

Unfortunately the report in Howell's *State Trials*, written by Lilburn, ends here. The editor adds a note as follows: "Notwithstanding the strictest enquiry, we cannot find that Lilburne, or his friends, or anyone else, ever published the remainder of his trial."<sup>1</sup>

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For such information as we possess as to the remainder of the trial, we are indebted to *Lilburn Tryed and Cast*; to a few stray references in Whitelock's *Memorials*; and to the researches of the late Prof. Gardiner in the British Museum, embodied in the second volume of his *History of the Commonwealth*.

<sup>1</sup> *St. Tr.*, Vol. V, p. 442.

While the trial was proceeding, Parliament had been discussing the third petition, which Lilburn had presented on July 13th. The same day the Council of State laid before the House a number of depositions relating to his overtures to the Royalists while abroad. These were afterwards circulated amongst the ranks of the army and the public generally. Prof. Gardiner thinks: "It is possible that but for these disclosures the House would have listened to Lilburne's request for the suspension of his trial, in order that the charge upon which he had been banished might first be submitted to a judicial investigation. As it was, though several voices were raised in his favour, Parliament finally decided to take no action."<sup>1</sup>

It was late at night on Saturday, July 16th, when the Court broke up, and as that was the last day of the Sessions, and the trial was still unfinished—in fact, hardly begun—it was of necessity adjourned *sine die*. The time thus gained was utilised by Lilburn and his friends to scatter appeals to the public and to urge Parliament to show mercy. On July 30th Lilburn himself appealed to the people in a pamphlet entitled "*O Yes, O Yes;*" and on August 2nd a violent petition was presented to Parliament in his behalf by six young men and apprentices. "The reply of Parliament was, to commit to prison the six youths who tendered the petition, and to order that Lilburne himself should be restrained in close confinement."<sup>2</sup>

G. GLOVER ALEXANDER.

<sup>1</sup> *Hist. Commonwealth*, Vol. II, p. 246.

<sup>2</sup> *Ibid.*, Vol. II, p. 247.

(*To be continued.*)

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## VI.—CURRENT NOTES ON INTERNATIONAL LAW.

### Greece and Roumania.

**O**WING to the conclusion of an arrangement with Turkey, by which certain rights were conceded to Roumanians living in the Ottoman dominions, attacks prompted by jealousy were made on Roumanians in Turkey, by bands which were said to be organised in Athens. Roumania remonstrated with Greece; but the latter country replied that she was not responsible for disorder in Turkey, whereupon Roumania denounced her commercial treaty with Greece and expelled several Greeks from Roumanian territory. Greece then withdrew her minister from Bucharest, and broke off diplomatic relations.

The action of Greece in taking this decisive step was influenced by the fact that she thought she had a still more serious grievance against Roumania. In denouncing the Commercial Treaty of 1900, the Roumanian Government affected at the same time to repudiate an important protocol which was annexed to that treaty. This protocol, putting an end to a long controversy, secured to eight Greek churches, with their dependent schools, in Roumania, recognition in that country as corporations. Practically, this amounted to the recognition of the Greek communities in those eight places (Braila, Sulina, and six others), as corporations: because the church is, in that part of the world, identified with the community. The Greek argument is that (1) foreign corporations must be recognised independently of treaty; (2) Roumania succeeds to the obligations of Turkey, and is bound to recognise them by the "capitulations" granted to Greece by the treaty of 1855; (3) the protocol is independent of the treaty to which it is annexed.

There seems little difficulty in repelling the first of these contentions. Even if it be the better rule of private International law to recognise foreign corporations, there is no rule of public International law requiring States to do so. But the argument drawn from the capitulations is strong: and the protocol is clear, and not limited to the duration of the commercial treaty.

*“ En procédant à la signature de la Convention de Commerce sous la date de ce jour (19 Dec., 1900) entre la Grèce et la Roumanie, les soussignés plénipotentiaires des deux puissances sont convenus de ce qui suit. Les églises helléniques comprises dans la liste annexée au présent protocole et qui fonctionnent actuellement en Roumanie d'après leurs propres actes de fondation, seront considérées comme personnes morales (juridiques) et continueront à fonctionner, ainsi que les écoles qui en dépendent, en se conformant aux lois et règlements du royaume de Roumanie. . . . Toutefois, elles ne pourront à l'avenir acquérir d'autres biens qu'en se conformant aux lois et règlements du royaume de Roumanie.”*<sup>1</sup>

It thus recites the occasion of its signature to be the conclusion of the commercial treaty; but it is nowhere made conditional or dependent upon that convention. At the same time, the impression is created that the Roumanian negotiators possibly understood it to be so. A question of detail might be raised. Roumania promised to recognise these churches as corporations, but did she promise to recognise them as Greek corporations? The nationality of a corporation is that of the Power which gives it existence; and although this might in the first instance be Greece, yet, *quoad* Roumania, it might well be asserted to be Roumania. Even so, however, the protocol would appear to secure their continued recognition, and to give Greece an interest in it.

<sup>1</sup> See G. Streit: *La question des communautés helléniques* (Paris: J. B. Sirey, 1906).

### Universal Peace.

Björnstjerne Björnson has been making a contribution to the discussion of this fascinating topic. In addressing a gathering of six thousand persons on the borders of Schleswig he expressed the sensible view that the independence of the North would best be preserved by a combination of the Northern Kingdoms, and not of them alone, but of all the small European States as well. The resulting alliance would aim at an universal agreement of peace. But how would Greece, for instance, lie down with Roumania? At the same time, some such federation preserving full internal autonomy and a certain measure of external freedom to each partner in the alliance, is the obvious *desideratum* of the smaller States. Now that the Hague Tribunal is ready to decide their disputes, there ought to be the less difficulty attending its formation. But the practical obstacles are immense; nevertheless they ought to be surmounted. Björnson does not trust the diplomatists to surmount them, but leaves the peoples to form their own alliances. But how can they do so, save by properly accredited agents? We may not style them diplomatists; still they would be doing diplomatists' work.

### Wireless Telegraphy in War.

Sir E. Fry, with all the weight of his high position and ripe experience, supports the view that belligerents must accept the risks of wireless telegraphy, and can neither require its suppression or supervision by neutral governments, nor treat those who employ it on the high seas as spies, or as subject to their naval dispositions. It may be inconvenient to a commander that neutrals have as much right to the high seas as himself; but the fact is so, and the balance of convenience is in favour of preserving neutral rights. Nothing short of positive evidence of complicity with the enemy will justify a naval officer in forcibly interfering with

a neutral who is engaged in observing and reporting his movements. Similarly a neutral is entitled to full liberty within his own territory, and his discretion in admitting news and permitting its transit is too delicate and valuable a right to be subjected to belligerent dictation. The present writer is glad to have advocated these principles from the first, in the columns of this Magazine<sup>1</sup> and elsewhere. Sir E. Fry also lays down with emphasis the proposition that a belligerent can never be justified in firing on neutrals, and must always take the risk of offensive operations. As he was British legal assessor to the North Sea Commission at Paris, this opinion is of great interest.

### Separate Domiciles of Married Persons.

In *Parkin v. P.*<sup>2</sup> some doubt was cast by Barnes, P., on the proposition that a deserted wife can sue for divorce in England after her husband has acquired a foreign domicile. *Bertin v. B.*<sup>3</sup> was not cited. It was held, on the facts, that it was not proved that the husband's domicile had changed: so that the President's doubts were *obiter*.

### Italy in the East.

The separation of Church from State in France has had the not unexpected effect of finally depriving the French Republic of its claim to be the natural representative of catholicism abroad. The Pope, altering the prior rule of the Vatican, has conceded permission to religious institutions in the Levant to choose their own secular protectors. Italian orders established at Jerusalem, Smyrna and Constantinople, have at once acted on this permission and placed themselves under the protection of Italy. On New Year's Day, every Italian foundation of importance in the Turkish capital flew the Italian and not the French flag.

<sup>1</sup> "Forty Propositions in the Law of Neutrality," *L. M. & R.*, Feb., 1906.

<sup>2</sup> *Times*, April 25, 1906.

<sup>3</sup> See *L. M. & R.*, Feb. 1906, 216.

• **Foreign Sovereigns.**

The cases of the *Charkieh* and the *Parlement Belge* are well known as illustrations of a rule which has just received a further exemplification in the case of the *Jassy*. This ship collided with the Greek ss. *Constantinos* at Sulina in 1905; and on her arrival at Liverpool, process was commenced against her in the Admiralty Division of the English High Court. The owner of the vessel was H.M. the King of Roumania, and an unconditional appearance was entered by his Majesty's agents. In spite of that appearance (which looked much like a submission to the jurisdiction), the suit was dismissed with costs, on the fact of ownership by the Roumanian Crown being certified to the Admiralty Registrar through the Foreign Secretary, by the Roumanian legation. The commercial employment of the ship (in the service of the State railways) does not, as is well settled, affect the principle, which rests on the fact that neither directly nor indirectly can a suit be entertained against a foreign sovereign.

**Rights of Riparian States.**

The Egyptian Government has asserted the right of a State through whose territory a waterway runs, to close the navigation against the countries bordering on the upper waters; and this in a very emphatic and decided manner. The Congo State borders on the Upper Nile, and as a lever for securing certain territorial advantages for Egypt, the Lower Nile was for some months closed to the passage of steamers for Congo ports. No question of the entire competence of this proceeding appears to have been raised: and in consequence of the pressure so exerted the Congo State has now agreed to withdraw from posts, south of 5° N. lat., and north of the Nile-Congo watershed, which its officers had occupied since March 1905.

### Proper Law of a Contract.

In a recent case in Scotland (*Robertson v. Brandes, Schönwald & Co.*, Sc. L. T., June 16th, 1906), the effect of *Hamlyn v. Talisker Distillery* appears to have been somewhat misapprehended by the Court of Session. The general rule is, that in ascertaining what law is to be applied to a particular contract, that law is to be chosen which has the most intimate relation with the subject-matter of the agreement. This will generally, though not necessarily, coincide with the intention of the parties. In *Hamlyn's Case*, the contract was one which involved both Scottish and English elements. It was a contract between Scottish and English parties for the supply of goods in Scotland, and it was held that the parties meant English law to apply, mainly because the instrument contained an arbitration clause which would have been bad by the law of Scotland. The decision can equally well be supported on the ground that such an arbitration clause showed that the contract had, in so ambiguous a case, more "real connection" with England than with Scotland.

But, in *Robertson's Case*, England hardly came into the contract at all. The contract was one between a Scotsman, living in Perth, and an Antwerp firm from whom he had ordered goods. There was a clause providing for arbitration "in London," but it is inconceivable that this by itself could mean that the parties adopted English law as governing the contract; or that it could make England the country with which the contract had the most intimate connection. "*Ubi est forum ibi ergo est jus*," is a venerable maxim; but it is not of such sweeping authority as this case would infer. The decision raises some interesting speculations, of which we will indicate one. If the intention of the parties is to be regarded as paramount in the choice of a law, can they split their choice, and have

Clause (1) of a contract governed by the law of China, Clause (2) by that of Virginia, and so forth, reserving the arbitration clause to be governed by the law of England? Or can it be said that, starting from the position that the parties meant their contract to be valid in all its details, we must look all over the world for a law in relation to every clause which will make that clause good?

It could hardly have been argued that this particular contract, apart from the arbitration clause, was meant to be governed by anything but Scots or Belgian law. The only question would have been, which? The fact—if it be a fact—that the parties introduced an arbitration clause to which English law was particularly applicable, cannot alter the position, unless it is possible for them to split their desires in the manner above suggested. It may be that the arbitration clause was good by Belgian law, and in that case, it would have been in perfect analogy with *Hamlyn's Case* to hold that this was a determining factor sufficient to show that Belgian law was the one applicable, and not Scots law. But it is not at all warranted by *Hamlyn's Case* to consider a contract English merely for the sake of supporting one particular clause in it.

### Restraint of Foreign Proceedings.

An instance of the use of the power of injunction to affect litigation abroad is afforded by the case of *Lett v. Lett*; (L. T., May 26, 1906, p. 83). The parties had been judicially separated in Ireland, and a certain allowance for alimony made, all other claims of the wife being released. This took place in 1888; the husband subsequently went to Argentina, and became resident and possessed of much property there. The wife commenced proceedings in the Argentine Court for a division of this

property, and the Irish Court (within the jurisdiction of which she resided) has restrained her from proceeding with the suit. It was held that as similar proceedings would have been restrained in Ireland, owing to the matrimonial Courts being seised of the whole litigation between the couple, they ought not to be allowed to proceed abroad.<sup>1</sup> It is submitted that the Master of the Rolls in Ireland went too far. In cases where the foreign proceedings are designed merely to open up again questions which have been decided here, it is true that litigation has been restrained. But where the object is to obtain a determination on a question of foreign law, the Courts have generally recognised the propriety of allowing the foreign Court, which best knows that law, to deal with the matter. On appeal (L. T., July 14, p. 266) the decision was upheld by the Chancellor and Fitzgibbon, L.J.; Holmes, L.J., dissented.

Another curious case of a similar kind came before Eady, J., on May 26th.<sup>2</sup> A Turkish Railway Company was wound up in England, but some of its assets were being administered in Constantinople. The Courts there declined to recognise the English receiver, and gave judgment in favour of a claim by a secured creditor. This judgment was obtained through the instrumentality of one of the promoters of the company, who established a right in Constantinople to represent it, and who consented to judgment in favour of the claimant. The English Court, in an action by other secured creditors, restrained him from holding meetings of the company in Constantinople, or from aiding the judgment creditor there, or otherwise interfering with the receiver. It did not commit him, but directed that question to stand over.

<sup>1</sup> See *Carron Co. v. Maclaren*, 5 H.L.C. 416.

<sup>2</sup> *Owen v. Syria Ottoman Railway Co.*, *Times*, May 28th, 1906.



### The Sinai Peninsula.

When two States are separated by a tract of uninhabited desert, the line of demarcation between them is apt to be obscure. When, in addition, the one State is half dependent upon the other, the situation is still more liable to confusion. It can hardly be pretended that either Turkey or Egypt was ever in very effective possession of the Sinai Peninsula, except along the northern coast, and in the neighbourhood of the Suez Canal. The influence would seem to be in favour of the suzerain as against the vassal Power, if a question arose between them as to the right of occupying the unadministered territory. The exact position of the boundary appears to have been more than once the occasion of dispute: the accession of the present Viceroy in 1892 provided one such opportunity for the Porte to endeavour to limit his dominions when issuing his firman. British remonstrance induced the Ottoman Government to telegraph its willingness not to insist on the desired limitation; and this somewhat informal diplomatic document has now been adopted as the basis of a settlement to be worked out by surveyors. It is perhaps the first occasion on which ten thousand square miles (even of desert) have been virtually ceded by telegram.

T. BATY.

### VII.—NOTES ON RECENT CASES (ENGLISH).

THE reports of cases in the Chancery Division during the last three months contain a number of interesting and useful decisions, but few of any great difficulty or importance.

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In *In re Edwards, Jones v. Jones* (L. R. [1906], 1 Ch. 570), a misleading *dictum* of a judge, whose *dicta* and decisions are often misleading, was set right. In *Kidman*

v. *Kidman* (40 L. J., Ch. 359, at p. 360), Malins, V.C., lays it down that where after a gift to testator's children on attaining a certain age, a gift over is made in the event of the testator dying "without any children," these words must be read, without any *such* children." Romer, L.J., points out that this *dictum* was based on a misreading of the decision in *In re Wrangham's Trusts* (1 Dr. & Sm. 358), and is bad law. Unless there is something in the context to alter their meaning, such words must be read in their natural sense.

In *In re Dunsany's Settlement*, *Nott v. Dunsany* (L. R. [1906], 1 Ch. 578), the Court followed *Hilbers v. Parkinson* (L. R., 25 Ch. D. 200), which, it seems, is doubted in *Norton on Deeds*, at p. 601, but has been treated by other text writers as good law. That case decided that an estate tail is not included within a covenant to assign after acquired property, on the ground that a fee tail is not in its nature assignable. It can be turned into a fee simple and assigned, or it may be assigned as a base fee, but it cannot be assigned as a fee tail. Would this unassignability be sufficient to bar the application of the doctrine of election also?

Another interesting point was decided as to the estates tail in *In re Gaskell & Walters' Contract* (L. R. [1906], 2 Ch. 1). There a felon was entitled to a fee tail, which his administrator under the Forfeiture Act 1870, wished to sell. It was held, that notwithstanding the large powers of alienation given to him by section 8 of the Act, he could not sell it, since, as held in *In re Dunsany's Settlement* (*supra*), a fee tail is not alienable. Neither could he bar the entail, since barring an entail is not an alienation. The right to bar the entail still resides in the felon himself after the administrator of his property is appointed.

"Born in my lifetime," includes any child *en ventre sa mère* for all purposes of devolution of property by will (or intestacy) unless the contrary appears. That is the effect of the decision of the Court of Appeal in *Villar v. Gilbey* (L. R. [1906], 1 Ch. 583), reversing the judgment of Swinfen Eady, J. (L. R. [1905], 2 Ch. 301). Lord Westbury's decision and *dicta* in *Blasson v. Blasson* (2 D. J. & S.), rendered it doubtful whether this rule applied when it was not for the benefit of the child that it should apply; but the better opinion has always been that it was subject to no such restriction.

"No sooner," said Stirling, J., in *In re Horlock, Calham v. Smith* (L. R. [1895], 1 Ch. 516), "No sooner was it [the doctrine of satisfaction of debts by legacies] established than learned judges of great eminence expressed their disapproval of it, and invented ways to get out of it." Swinfen Eady, J., declines to continue inventing such ways. In *In re Rattenberry, Ray v. Grant* (L. R. [1906], 1 Ch. 667) he has held, that a legacy greater than the debt is a satisfaction of the debt if the payment of the legacy is not postponed. The legacy then bears interest from the death of the testator, and is regarded as owing from such death although in fact it may not be recoverable till the lapse of a year. But if the payment is expressly postponed even for one or two months, then it is no satisfaction. It is the observation of these broad and natural lines of demarcation which renders English law so eminently reasonable and comprehensible to the minds of all laymen.

The six following decisions are of practical importance :  
 (1) Where there is a trust for the sale of leaseholds, parts of the hereditaments included in one lease may be sold by way of sub-lease (*In re Judd and Poland and Skelcher's Contract*, L. R. [1906], 1 Ch. 684). . (2) In a probate action since the

Land Transfer Act 1897, where the Court directs that the costs of the action shall be paid "out of the estate," the "estate" includes the realty as well as the personalty included in the will (*In re Vickerstaff, Vickerstaff v. Chadwick*, L. R. [1906], 1 Ch. 762). (3) Where trust funds are so invested that income tax is paid out of the income before it reaches the trustee's hands, the trustee must in paying annuities charged on the funds deduct the income tax from the annuities (*In re Sharp, Rickett v. Rickett*, L. R. [1906], 1 Ch. 793). (4) Where judgment has been given for specific performance which the defendant fails to obey, then if the contract contains a clause forfeiting the deposit and permitting a re-sale, the Court may make an order for a forfeiture of the deposit and for payment of the deficiency on a re-sale, and costs, instead of the usual order rescinding the contract (*Griffiths v. Vezey*, L. R. [1906], 1 Ch. 796). (5) Where an authority takes minerals for support, a life tenant who is entitled under the settlement to the whole of the royalties on the minerals, is not entitled to receive the whole sum paid as compensation immediately it is paid. The sum must be spread over the number of years it would take to get the minerals, and the part allocated to each year paid to him in that year (*In re Fullerton's Will*, L. R. [1906], 2 Ch. 138). (6) An architect, in supervising the erection of buildings, has no authority as architect to enter into any agreement or do any act which will affect the building owner's rights over his own property (*Frederick Betts Limited v. Pickfords Limited*, L. R. [1906], 2 Ch. 87).

What is the proper measure of damages at Common law where injury is done to the surface by subsidence caused by working the subjacent minerals? The majority of the Court of Appeal say, the difference in the market value of the surface before and after the subsidence. Romer, L.J., says the amount of damage actually done to the surface. He contends

that any further damage given is not caused by the working of the minerals, but by the apprehension of further damage to the surface (*Tunncliffe & Hampson Limited v. West Leigh Colliery Co. Limited*, L. R. [1906], 2 Ch. 22). We confess the view of Romer, L.J., appears to us the proper one. Take another case by way of illustration: A. breaks down obstructions across a path and declares his intention of breaking down similar obstructions across other paths on B.'s land. B. sues A. If B. succeeds in his action, is he to have as damages, not merely those due to B.'s actual trespass, but any fall in the market price of his land, due to the fear of possible purchasers that A. may, by removing other obstructions, cause further litigation?

J. A. S.

By the Licensing Act 1904, Parliament probably intended to empower Quarter Sessions to refuse renewal of the licence of a public-house on being satisfied that there would be, without the disfavoured inn, sufficient tavern accommodation in the neighbourhood to tranquillise the thirst of all the residents and passers by. The terms of the Act suggest this; but the Divisional Court, by deciding in *Dartford Brewery Company v. County of London Quarter Sessions* (L. R. [1906], 1 K. B. 695; 75 L. J. R., K. B. 415) that evidence must be produced at the Sessions differentiating between the house alleged to be redundant and the other licensed places in the district, have given new life to an old difficulty. The point was dealt with in *Raven v. Southampton Justices* (L.R. [1904], 1 K. B. 430), a case decided before the Licensing Act came into force, in which Kennedy, J., who dissented from the judgment, said that he knew of no authority supporting the claim that objection to renewal must fail unless affirmative evidence establishes that the licence objected to less deserves renewal than the licence of any other house in the same locality. As it may be very difficult to differentiate between houses of the same character close together, it is quite possible that the Act may be of little value.

*Darling v. Raeburn* (L. R. [1906], 1 K. B. 572; 75 L. J. R., K. B. 415) will be approved not only in the shipping industry, but on equitable principles. If a man hires a ship or anything else, it should be for the agreed time entirely for his use, except so far as there has been reservation to the contrary; and where a clause in a charter-party makes the charterer liable for the costs of shifting cargo, it would be inequitable to enforce the clause when the necessity for shifting was caused by the shipowner having filled up bunker coal not only for the requirements of the chartered voyage, but, for his own advantage, to afford also the means of further travel after the charter-party had expired.

The desire is strong in most men to get by the shortest route and at the highest speed to any given point to which constraint or inclination urges. But *Elwes v. Hopkins* (L. R. [1906], 2 K. B. 1; 75 L. J. R., K. B. 450; 94 L. T. R. 547) warns them that if a motor is their vehicle the driver must regulate his speed by the hypothetical not the visible units on the road he wants to career over, for the Motor Car Act 1903 says that troubles hover about him if he drives at a rate which is dangerous, having regard to the amount of traffic not only which is, but "which might reasonably be expected to be, on the highway."

In our issue of February last (Vol. XXXI, No. 339, p. 227) an instance was noted of the Court having to wrench the language of an Act from its verbal meaning, and to convert it into quite another meaning, if the Statute was to be rescued from nonsense and made useful to the world. *Walker v. York Corporation* (L. R. [1906], 1 K. B. 724; 75 L. J. R., K. B. 413) affords another curious example. The terms of sect. 89 of the Highways Act 1835 are, as respects any proposed new road, that if a jury's verdict is

(a) that the proposed road would be better than an existing one, or (b) that a person appealing to Quarter Sessions against it would not be aggrieved by its being made, then his appeal is to be dismissed. No one would object to (b); but if by the change of road an injury would be inflicted upon the man, he would be hardly used by his appeal being swept aside, however great the benefit might be to his neighbours. Then the Act goes on to say that if the verdict is that (c) the new road would not be better, or (d) that it would be a wrong to the appellant, then Quarter Sessions shall allow the appeal. This would be fair enough. But if destiny were to fling (a) and (b) together, or (b) and (c), the directions of the Act would be contradictory. So the Court, acting on Lord Halsbury's decision in *Mersey Docks and Harbour Board v. Henderson*, 13 App. Cas., have read as a conjunctive the disjunctive between (a) and (b); and therefore (a) must be plus (b) to command the dismissal of an appeal.

The duplicity rule that no single count of an indictment should charge a defendant with committing two or more offences, is a proper and necessary one to avoid unfairness or embarrassment to a prisoner. But that is quite a different thing from charging in one count an injury to two or more persons by the same transaction, as, for instance, the uttering of a number of forged receipts, where proof is given that they were all uttered at the same time and in one bundle. In *Rex v. Cable* (L. R. [1906], 1 K. B. 719; 75 L. J. R., K. B. 381) the Court have refused to bring within the rule a charge under the Cruelty to Animals Act, in which a man was convicted for torturing five cows by allowing them to be overstocked by milk. One of the reasons for the decision appears to have been that sect. 29 of the Act makes the singular include the plural; and Ridley, J., was of opinion that a good deal

was to be said in favour of the conviction being bad in form. But the view of Bray, J., is the sounder, viz., that he should have come to the same decision, that the conviction was good, if there had been no authority on the point.

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The wholesomeness of our food is a subject just now of much domestic question, and it is satisfactory to find, as multiplying the agents of vigilance against a serious danger, that in *Giebler v. Manning* (L. R. [1906], 1 K. B. 709; 75 L. J. R., K. B. 463; 94 L. T. R. 580) the Court have interpreted sect. 47, sub-sects. 1 and 2 of the Public Health Act 1891, to mean that any private individual may take proceedings against a person who sells, or exposes for sale, an article intended for food but unfit for such a use. It has been hitherto generally thought that only a medical officer of health or sanitary inspector had this power.

Coming under the next succeeding sub-division of the same section is the case of *Grivell v. Malpas* (L. R. [1906], 2 K. B. 32), and here happily the Court have held that a magistrate was wrong in dismissing a summons against a wholesale dealer who had supplied unsound meat to a retailer, and had raised the defence that as the retailer had not had time to examine the meat, it had not been exposed for sale.

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It is to be regretted that in *Paquin v. Beauclerk* (L. R. [1906], A. C. 148; 75 L. J. R., K. B. 395; 94 L. T. R. 350) there were not five peers present at the hearing instead of four, as it must always be unsatisfactory in a final appeal to have a divergent view; and in this case the opinion of one moiety is entirely contrary to that of the other. The point turns upon the true interpretation of sect. 1 of the Married Women's Property Act 1893. The words themselves are plain enough. Every contract entered into by a married



woman, otherwise than as agent, shall be deemed to be a contract entered into by her to bind her separate property whether she has any at the time or not. The Lord Chancellor and Lord Macnaghten read the words as meaning, that when a married woman is in fact the agent of her husband and enters into a contract with the intention of that agency in her mind, it is immaterial whether the person who gives her credit does or does not know that she is a married woman, and that in such a case it is the husband who is liable and not she. On the other hand, Lords Robertson and Atkinson hold that though it may be a fact that goods ordered by a married woman are ordered with the consent of her husband and by her as his agent, yet it is "legally impossible to hold that she contracts as agent" if the creditor is unaware that she is in cohabitation with her husband and has his authority, and even, as in this case, is ignorant that she has a husband at all: in short, they hold that she is merely in the position of an agent acting for an undisclosed principal. The better opinion will be with the Lord Chancellor and Lord Macnaghten, but the decision would have been more free from question if it had been enunciated by a majority.

T. J. B.

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### SCOTCH CASES.

In the winding-up of an insolvent company the Court is often called upon to decide an initial contest between creditors and contributories as to which is to have the control of the liquidation. The usual sequence of events is a petition by a creditor, probably for no very large amount, to have the company wound up by the Court. This is immediately followed by a meeting of the shareholders, at which the usual extraordinary resolution for a voluntary liquidation is passed and a liquidator is appointed. The company and liquidator then appear in the

creditor's application and crave that the voluntary liquidation be continued subject to the supervision of the Court, and that the voluntary liquidator be continued in office. All this was done in *Elmslie & Sons v. Tomatin Spey District Distillery Limited*, 43 S. L. R. 324. The petitioning creditor suggested one liquidator and the shareholders appointed another. The shareholders were quite within their rights in acting as they did, and their resolution could only be superseded by the creditors coming forward and showing cause why it should not be given effect to. In this case, however, the great mass of the creditors supported the action of the shareholders, and by their mandates approved of the winding-up under supervision. A question was raised as to the competency of an order continuing the voluntary winding-up without a petitioning creditor. It was urged that the mere lodging of mandates of creditors was not sufficient, but in the course of the argument Lord Stormonth-Darling referred to *Drysdale and Gilmour v. Liquidator of International Exhibition*, [1890], 18 R. 98, where such an order was pronounced although there was no petitioning creditor. The Court held that as no special cause was shown why the voluntary liquidation should not stand, the action of the shareholders should be sustained. In giving judgment, the Lord Justice-Clerk added that, while apart from authority this was the view of the Court, the matter had been already decided in England (*In re West Hartlepool Ironworks Company*, [1875], 10 Ch. 618), "and it would be very inconvenient to have a different practice here from in England."

In recent years the law of master and servant largely resolves itself into questions under the Workmen's Compensation Acts, and although there is still a Common law on the subject, and the Employers' Liability Act of 1880 is not a dead letter, the ratio of such cases to the total number

before the Courts is very small. The last quarter in the Scottish Supreme Court is typical of a much more extended period. Out of eight cases only two are not directly connected with the Act of 1897. One of the exceptions referred to is *Russel v. M'Clymont* (43 S. L. R. 601), where a niece sued her aunt's testamentary trustee for "reasonable remuneration" for services rendered over a period of several years. The Court found that the pursuer had "most efficiently attended to and nursed her aunt" during these years until the aunt died, but that she had done so out of family affection, and had received in return her clothes and a home in her aunt's house. There was no contract, and it seemed that at the time she had been content to give her services without remuneration, except such as she might receive in the shape of testamentary bequests. She received under her aunt's will a share of residue which might amount to about £600; but she was not unnaturally aggrieved that others not more nearly related and who had not borne the heat and burden of the day should have an equal share. This, however, was sentiment and not law, and the pursuer's claim was repelled.

The other case at Common law was *Lunnie v. Glasgow and South Western Railway Co.* (43 S. L. R. 372), in which a carter in the defender's employment requested a boy of ten years of age to take charge of his horse and lorry within the entrance to a goods station, where the boy was injured through another carter in the same employment negligently running his lorry into that of the first carter. The Court dismissed the action, because the boy, whether he volunteered his services or gave them at the carter's request, could be in no better position as regards claims against the carter's employers than the carter himself, and the principle of common employment applied.

The cases under the Workmen's Compensation Acts were as follows:—In *Binning v. Easton & Sons* (43 S. L. R.

312), a Court of seven judges found by a majority that a judgment of the sheriff in an application for a special warrant to have an alleged agreement under the Act of 1897 recorded was final, and an appeal therefrom was therefore dismissed as incompetent. In *Vaughan v. Nicoll* (43 S. L. R. 351), and in *M'Groarty v. John Brown & Co. Ltd.* (43 S. L. R. 598), the question was as to what amounted to "serious and wilful misconduct." In the former case, a farm servant driving a lorry had tied the reins to a drag wheel so that the horse's head had been pulled round, and having thus been made to run back on an incline the lorry was upset and the servant injured. Such was the finding of the sheriff-substitute, who refused compensation, and the Court, on appeal, held that the decision was final. In the case of *M'Groarty* the finding was that "being drunk and unfit for work" was serious and wilful misconduct within the meaning of the section.

In *Caledon Shipbuilding Co. v. Kennedy* (43 S. L. R. 430), a workman claimed compensation alternatively under the Employers' Liability Act 1880 or under the Workmen's Compensation Act 1897. The employer admitted liability, but objected to the competency of the proceedings, since there was no question at issue between the parties as required by sect. 1 (3) of the Act of 1897. The sheriff awarded compensation and refused to state a case, but the Court held that he was bound to state a case, since questions of law were involved in regard to jurisdiction and competency. In *Allan v. Thomas Spowart & Company, Limited* (43 S. L. R. 599), a medical referee reported that the injured workman's wage-earning capacity would be completely restored in the course of three months; upon which the arbiter directed the compensation previously awarded to be reduced for three months and thereafter to cease. The Court, on appeal, held that the arbiter had

exceeded his powers, inasmuch as his function was to assess compensation on the basis of the workman's present state and not on the probabilities of a future time. In *M'Allan v. Perthshire County Council* (43 S. L. R. 592), the engineman of a steam-roller arranged with a surfaceman in the same employment to get up steam on the roller before the surfaceman's hours of duty commenced. The surfaceman was injured while so acting for his absent fellow-workman. It was held that the accident did not arise out of and in the course of the surfaceman's employment in the sense of section 1 (1) of the Act.

R. B.

### IRISH CASES.

*O'Hanlon v. Logue* ([1906], 1 Ir. R. 247) will be a leading case upon charitable gifts. In Ireland, gifts by will for the celebration of masses are not illegal, as such gifts would be in England by the effect of a Statute of 1 Edw. VI. Such gifts have long been held good charitable gifts in Ireland, but for the past thirty years it has been a settled principle that they are not charitable absolutely, but charitable *sub modo*. A necessary condition for the validity of the gift was that it should contain a direction for the *public* celebration of the mass; the saying of masses in private was not a good legal charity. This distinction between public and private masses was founded on *Att.-Gen. v. Delaney* (Ir. R., 10 C. L. 104). It had never come directly before the Court of Appeal, though it had been acquiesced in by the profession and followed by Courts of first instance; and the soundness of any such distinction, in fact, had never been admitted by Roman Catholics. Now, the Court of Appeal have over-ruled *Att.-Gen. v. Delaney*, holding that a bequest for masses in perpetuity is a good charitable gift, whether there be a direction that the masses shall be celebrated in public or not.

The *ratio decidendi* was variously put by the different members of the Court who all delivered very full judgments. Walker, L.C., said: "It is settled by authority which binds us that where there is a direction to celebrate the mass in public, the gift is a valid charitable one; but what makes it charitable is the performance of an act of the Church of the most solemn kind, which results in benefit to the whole body of the faithful, and the results of that benefit cannot depend upon the presence or absence of a congregation." Palles, C.B., considered exhaustively the nature of the mass in Catholic belief, and its relation to the Common law before the Reformation as illustrated by the characteristics of spiritual tenures. He came to the conclusion that "the narrow view taken in *Att.-Gen. v. Delaney*, that the *only* element of public benefit in the celebration of the mass is the instruction and edification of the congregation present, fails to appreciate it as a gift to God: as a gift made in the expectation that because of it the divine service of a Christian Church—a supreme act of divine worship—would be offered in the name of and by the authority of the whole Church: as an act from which the Common law knew previous to the Reformation, and therefore knows now, that benefits spiritual and temporal flow to the general body of the faithful—benefits which, even were they spiritual only, would render the service charitable within" the Irish statute corresponding to 43 Eliz., c. 4.

The decision of the Court of Appeal in *Att.-Gen. v. Cochrane*, referred to briefly in these notes in last February's number of the *Law Magazine and Review*, has affirmed the King's Bench Division, and is reported in [1906] 2 Ir. R. 200.

The lessee of a farm for a term of years bequeathed the farm to his widow for life, and after her death to her

nephew, appointing the widow his executrix. On the expiration of the term the widow was accepted as yearly tenant at an increased rent by the lessor. She afterwards sold her interest to her brother, reserving a room in the house for herself. The brother was aware of the will of the testator, and of the circumstances of the new letting; he went into possession and paid the rent, but receipts were given in the name of the representatives of the testator. After the death of the widow the nephew sued the brother, claiming that the yearly tenancy was bound by the limitations created by the will as to the term. *Held*, that it was so bound. *Egan v. Stack* ([1906], 1 Ir. R. 320).

It sometimes happens that considerable difficulty is found in supporting a rule of law which has become firmly embedded in the text-books, but which rests only upon an old decision, and has not for many years come under review. Such a difficulty arose in *Eivers v. Curry* ([1906], 1 Ir. R. 386). It is a general rule in the construction of wills that a legacy to a person appointed executor is *primâ facie* conditional on his accepting the office. It has, however, been stated in all the most authoritative text-books that this rule does not apply where the gift is residuary, and that in that case the donee is *primâ facie* entitled whether he proves the will or not. This exception rests upon a statement by Shadwell, V.C., in *Griffiths v. Pruett* (11 Sim. 202), decided in the year 1840; and in that case the Vice-Chancellor says that he had "always understood" the rule to be that "where either a general or specific legacy is given to an executor, he must prove the will in order to entitle himself to it; but that does not apply to the case of a residue." The exception so stated was applied in one or two other cases decided about the same time, but since then it does not appear to have been formally adopted in any reported case. The soundness of the

alleged exception was now challenged, and the Master of the Rolls declined to follow it, principally on the ground that an apparently contradictory decision of Lord Cottemham's in *Barber v. Barber* (3 My. & Cr. 688), showed that the matter was still open. The Court of Appeal, however, reversed this decision, being of opinion that there was no ground for holding that Shadwell, V.C., had not correctly stated a rule of law with which he must have been familiar, and also thinking that even apart from his authority there were sensible reasons for the exception. The result, therefore, is to establish the authority of *Griffiths v. Pruett*.

That unfortunate and unsatisfactory fiction of service, upon which the modern action for seduction is founded, often gives trouble. In *Murray v. Fitzgerald* ([1906], 2 Ir. R. 254), it led to the dissent of Gibson, J., in the Divisional Court, and of Holmes, L.J., in the Court of Appeal. The question, as usual, was whether there was evidence of service sufficient to sustain a verdict for a plaintiff, who in this case was a younger brother suing for the seduction of his sister: and one peculiarity of the case was that the brother and sister were in some sense co-owners of the farm on which they resided, and on which the household work was done by the sister. The verdict for the plaintiff was upheld, though with the dissents above mentioned. A noteworthy feature in the judgments of the Court of Appeal is that Fitzgibbon, L.J., adopted and incorporated with his judgment the language of Sir Frederick Pollock in his well-known text-book on the law of tort (*Pollock on Torts*, 7th ed., p. 226).

J. S. B.

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## Reviews.

[SHORT NOTICES DO NOT PRECLUDE REVIEWS AT GREATER  
LENGTH IN SUBSEQUENT ISSUES.]

*The Victorian Chancellors.* Vol. I. By J. B. ATLAY. London :  
Smith, Elder & Co. 1906.

Mr. Atlay is very well qualified for the task he has undertaken ; he has a pleasant style, and is well acquainted with the law and history of the period which he treats here. The present volume contains the lives of Lords Lyndhurst, Brougham, Cottenham and Truro. The lives of the first two are much the more important and interesting, though their subjects were not better or perhaps even so good lawyers as Lords Cottenham and Truro, but they were bigger men, and of much more political importance. Brougham is the most striking character of them all, and we quite sympathise with Mr. Atlay in including him in his book, although, as he admits, Brougham was not a Victorian Chancellor. Out of about 450 pages Lord Brougham takes up rather more than 200, and Lord Lyndhurst nearly 170, leaving Lords Cottenham and Truro less than 80 pages between them. The account of the trial of Queen Caroline is good, and points out alike the great abilities of Brougham, and his injudicious management of his case. It is hard to understand how Denman can have been so indiscreet as to make his two famous quotations. He suffered for the first, but his client did not for the second. We should like to have had more information as to Brougham's ordinary legal work, and as to how he managed some of the big cases in which he must have been engaged. Lord Lyndhurst is an interesting figure not only from his professional, judicial, and political eminence, but for the great age he attained with his faculties so wonderfully preserved. As Mr. Atlay says on the first page, "When as a two-year-old infant, he first quitted the land of his birth, the North American Colonies were part of the dominions of King George. As he lay on his death-bed the war of succession was at its height, and the fate of the Union was still trembling in the balance. He was a third-year man at Cambridge when Louis XVI perished on the scaffold : he was called to the Bar the year before Trafalgar ; and he was Solicitor-General when Queen Victoria was born." He died in 1863. Mr. Atlay vindicates him from many of the attacks of Lord Campbell, and makes a fine and striking

character of him. The lives of Lords Cottenham and Truro are not very interesting. We are interested and pleased to see many references in the notes to this journal, some of them dating back to the time when the *Law Review* and *Law Magazine* were separate publications. Some illustrations add to the attractions of the book. As Mr. Atlay has only succeeded in getting four Chancellors into this volume, we rather wonder how he will succeed in getting Lords St. Leonards, Cranworth, Chelmsford, Campbell, Westbury, Cairns, Hatherly, Selborne and Herschell into his next. We assume he will not include the ex-Chancellor. We shall look forward with interest to that volume.

*The Arbiter in Council.* London: Macmillan & Co. 1906.

This volume of imaginary conversations on War, its causes and cure, will be more interesting to the politician than to the lawyer. The home-truths which it tells the former will do him good if he takes the trouble to read them; but the Author lapses occasionally into platitude, and his interlocutors all speak in one and the same sententious dialect. We doubt, too, whether it is as true as it is apparently fashionable to say that in Queen Elizabeth's time piracy was "an honourable profession as long as you only plundered the foreigner." And we have no doubt whatever that *The Alabama* was not "a privateer" and divided by a thin partition from a pirate. Nor, again, do we think that it was altogether Sir A. Clarke's persuasive eloquence which founded British influence in Pêrak. We seem to have heard of a Pêrak War. And it is certainly strange to see an archdeacon described as a "prelate."

*The Law of Money-Lending, Past and Present.* By J. B. MATTHEWS. London: Sweet & Maxwell. 1906.

Mr. Matthews thinks it not improbable that the usury laws may be to some extent re-enacted, and partly in consequence of this opinion has devoted the first part of this book to a short History of Usury in England. This is an interesting dissertation both on law and history, and ranges from the time of Henry II to the year 1854, when, largely through the influence of the writings of Bentham, the usury laws were totally repealed. The second portion of the work is devoted to what might perhaps be called a reaction against Benthamism, the Money Lenders Act 1900. This Act Mr. Matthews

is very familiar with, and he examines it minutely and argumentatively. He points out with great force the difficulties the Judges find in construing the terms "excessive" and "harsh and unconscionable." He also points out the difficulty of reconciling the judgment of Mr. Justice Channell in *Carringtons, Ltd. v. Smith* with the decision of the Court of Appeal in *In re a Debtor*, and criticises the justice of relief being granted only against those who are "money-lenders" within the meaning of the Act. Three distinctions, the Author considers, have already been drawn in the decided cases: (1) between secured and unsecured loans; (2) whether or not the borrower is competent and independent; (3) presence or absence of some unconscionable element; and he proposes to add a fourth, namely, between first transactions and renewals, which he thinks deserves to be brought into more prominence. The Appendixes give the Money-Lenders Act 1900, the Betting and Loans (Infants) Act 1892, Statutory Rules and Orders, and three cases, one reprinted from *The Times* and the other two from shorthand notes.

*A Treatise on Deeds.* By R. F. NORTON, K.C., assisted by R. H. DUN and D. L. F. KOE. London: Sweet & Maxwell. 1906.

This important work is founded on the well-known book, entitled *Rules for the Interpretation of Deeds*, published in 1885 by Sir Howard Elphinstone, Mr. J. W. Clark, K.C., and the present Author. Mr. Norton was asked to prepare a new edition, and having entirely re-written the greater part of the book, re-arranged all the authorities, and incorporated a large amount of additional matter, has very properly produced the book under his own name. The result strikes us as very good in all respects, and the work is one which will be invaluable to all conveyancers and real property lawyers, and of much use to others. It combines knowledge with clearness of exposition to an unusual degree. The arrangement is rather different from that of the work on which it was founded. It begins, as we consider properly, with the form and execution of deeds; and we are glad to find that, after pointing out the difficulties of a satisfactory definition, and giving various incomplete, too extensive, and other definitions by eminent hands, Mr. Norton goes on to contribute his own definition, which is as follows: "A deed is a writing (1) on paper, vellum, or parchment; (2) sealed; and (3) delivered; whereby an interest, right, or property passes, or an obligation binding on some person is created, or which is in affirmance

of some act whereby an interest, right, or property has passed.' We propose to call attention to a few of the controversial points discussed, and Mr. Norton's opinions on them. There is a learned examination of the statement contained both in *Grant on Corporations* and *Cruise's Digest* "that the affixing of the common seal to the deed of a corporation is tantamount to a delivery," and after a careful examination of the cases the learned Editor, in spite of the expression of Fry, J., in *Gartside v. Silkstone and Dodsworth Coal and Iron Co.*, concludes that "there is no authority for such a proposition; indeed, what authority there is on the point is the other way, and the statement cannot be accepted as law." The chapters on the construction of deeds—when evidence is admissible to explain ambiguities—patent or latent—and when evidence of intention can be given, will repay the most careful perusal. We do not know any work in which so difficult a subject is so well and clearly treated. It is summed up in the recapitulation on page 110. A common misunderstanding is corrected on page 117, where it is shown that the rule that words are to be taken against the person using them does not mean that the words are to be twisted out of their proper meaning. Considering the great and well-deserved authority of *Lewin on Trusts*, we think it worth pointing out that Mr. Norton thinks the proposition, "In dealing with the trust estate the Court has regard to the trust, and will not construe general words to pass the trust estate where the assurance, if so construed, would amount to a breach of trust," is "laid down too widely, and ought to be restricted to cases where the conveyance of the estate would *on the face of the assurance*, amount to a breach of trust." It is submitted that Sir George Jessel's *dicta* as to restrictions on alienation in *In re Macleay* cannot be supported. The last reference we can permit ourselves is to the recapitulation on page 482 of the rules on the very difficult subject of vesting of portions. A valuable Glossary which was contained in the old book has been omitted, in consequence of the publication of the second edition of Mr. Stroud's *Judicial Dictionary*.

*Trial of Dr. Pritchard.* Edited by W. ROUGHHEAD. London: Sweet & Maxwell. 1906.

The trial of Dr. Pritchard created a great sensation at the time, and his memory has survived as one of the most cruel, cold-blooded scoundrels, who ever murdered a loving, confiding woman, and he

murdered two. Perhaps, however, his hypocrisy is more appalling even than his other crimes, and it is impossible to say what one thinks of a man, who lay down, night after night, by the side of the woman he was slowly torturing to death, and to whom he had been faithless, and could then enter in his diary: "Died here at 1 a.m., Mary Jane, my own beloved wife, aged 38 years. No torment surrounded her bedside, but like a calm, peaceful lamb of God, passed Minnie away." We will not add the blasphemous remarks that follow. The trial was hard fought, and is full of interest, the counsel engaged being men of great ability. The Solicitor-General, afterwards Lord Young, Adam Gifford, and James Arthur Crichton were for the Crown. The prisoner was defended by Andrew Rutherford Clark, afterwards Lord Rutherford Clark, and William Watson, afterwards Lord Watson. The judges were the Lord Justice Clerk, Lord Ardmillan, and Lord Jerviswoode. There are several interesting points of evidence, and the speeches of Young and Clark, and the summing-up of the Lord Justice-Clerk, well repay reading. There is not a shadow of doubt as to Pritchard's guilt, even without his confession; the only obscure point is that the motive seems hardly sufficient.

*A Treatise on the Law of Vendor and Purchaser of Real Estate and Chattels Real.* By T. CYPRIAN WILLIAMS, assisted by J. F. ISELIN. London: Sweet & Maxwell. 1906.

Mr. Williams's long-promised second volume has at last appeared. He apologises for the delay, and explains that it has arisen from an under-estimate of the difficulties, and too sanguine expectations. He has found it necessary, in order to carry out his design of a complete treatise, to write at far greater length than he expected. As an instance, he has been obliged to add a complete chapter—namely, that on the Discharge of the Contract, which he had not contemplated. The proposed order of subjects considered in the volume has been somewhat changed. The volume begins with the grounds for avoiding the contract, such as Mistake, Fraud, Misrepresentation, Duress and Undue Influence, Illegality in the Contract, and Personal Incapacity. The next chapters deal with Incapacity in Equity arising from the relationship between the parties, Discharge of the Contract, and the Remedies for Breach. The last chapter is on Sale of Registered Land. What, perhaps, strikes one most among the features of this excellent book, is the number of difficult and

doubtful points discussed, and the ability and fearlessness with which decisions and authorities are criticised. At the very outset there is an interesting argument as to the true theory of English Law with respect to mistake as a ground of avoiding a contract. The rule Mr. Williams lays down is, "that, where owing to a mistake the parties' minds are not at one, the contract is void—that is to say, there is no agreement at all." He admits that in the vast majority of instances this rule is qualified by the law of estoppel by outward manifestation of consent, but he maintains that this is the rule of pure law, "so pure that it rarely emerges from the region of abstract theory into concrete shape," and this in opposition to the views of Professor Holland and Justice O. W. Holmes. Mr. Williams considers the *dictum* of Collins, M.R., in *Van Praagh v. Everidge* misleading, as he overlooked the qualification to the before-mentioned rule of law, and did not consider whether the defendant was not estopped from proving his real intention. He does not assent altogether to a rule that has been suggested, that in equity "a latent defect of quality, which is not discoverable by any inspection or inquiry that a prudent purchaser might reasonably be expected to make, and is known to and not disclosed by the vendor, is a good ground for refusing to grant specific performance at the vendor's suit." This rule, he considers, is subject to the qualification "that the defect must be such as will naturally interfere with the enjoyment *promised by the contract* or the vendor's representation, or the concealment must be fraudulent." A subject discussed at considerable length is whether rectification of a written executory agreement, together with specific performance of the rectified agreement, will be granted, and whether rectification will ever be granted where the mistake is unilateral. On the first point Mr. Williams prefers the opinion of Sir Edward Fry and the decision of North, J., in *Olley v. Fisher*, to the decision of Farwell, J., in *May v. Platt*, refusing to grant specific performance with a parol variation at the plaintiff's suit. On the second point, after a criticism of the cases, the Author has to come to the conclusion that the law is in a most unsatisfactory condition. The decision of Bacon, V.-C., in *Taylor v. Johnston*, that a voluntary gift of money by an infant was valid and not voidable, is strongly disapproved of, and it is suggested that Lord Mansfield's *dictum* in *Earl of Buckinghamshire v. Drury*, on which the Vice-Chancellor's decision is probably based, is misreported. There are many other points and discussions which we should like to refer

to if we had space; such as those connected with the incapacity of married women; "a subject of the most appalling intricacy." Another point on which there is much difference of opinion is as to what, on the dissolution of a corporation, becomes of the lands of which it was seised in fee simple; and the Author submits that the lands escheat to the lord of the fee. We notice, that in submitting that an evicted purchaser is entitled to recover, on breach of a covenant for quiet enjoyment, the full value of the land at the date of the breach, "notwithstanding that its value should have been enhanced, since it was conveyed to him, by circumstances independent of his own outlay or efforts," the Author differs with the learned Author and Editor of *Mayne on Damages*. We wish specially to direct attention to the discussion of the difficulties and disadvantages of dealing with mortgages of registered land. The work is now completed by a table of cases and an index, and some pages of *addenda* to the two volumes, and we have little doubt the complete work will be of the greatest value to conveyancers of both branches of the profession, for whom it is intended.

*Roman Private Law.* By R. W. LEAGE, M.A., B.C.L. London: Macmillan & Co. 1906.

This will be found a handbook of great service to the student of Roman law, in fact, much more trustworthy than most books of this class. Mr. Leage is not dull, and the student will not be repelled at the outset, as he may well be if he use some introductory works which could be named. As far as one has tested the book, it seems correct in its law. The notes are among the best parts, see especially those on correality (p. 345), contract (p. 348), agency (p. 421). They allow room for discussion of the views of Savigny, Maine, Hunter, and others, which the comparative brevity of the text has to pass without notice. The type is clear and the margin ample, both matters of importance in a book of this kind.

**Second Edition.** *The Law of Banking.* By HERBER HART, LL.D. London: Stevens & Sons. 1906.

Mr. Hart has the best of reasons for bringing out a new edition: the last one has been already exhausted, although it had been published less than two years. This is a more tangible proof of the merits of the work than any remarks of ours. Mr. Hart has

taken this opportunity of adding the cases decided since the first edition was issued. They amount to something like 140, and some of them are of considerable importance. He has also increased the value of his work by adding an appendix of some forty pages dealing with Stock Exchange transactions, which is likely to be of considerable service to his readers. We notice that a few omissions to which we called attention in our notice of the first edition have been supplied.

**Second Edition.** *The Legal Principles and Practice of Bargains with Moneylenders.* By H. H. L. BELLOT, M.A., B.C.L. London: Stevens & Haynes. 1906.

Mr. Bellot's book, of which this is practically a second edition, was published in 1897 before the passing of the Moneylenders Act 1900. "Its object was to point out how, even at that date, the improper operations of the moneylender might be restrained by the application of the equitable doctrine of harsh and unconscionable bargains. It also had an ulterior motive in advocating the incorporation of this doctrine in the proposed legislation." The Authors had the satisfaction of seeing their proposals embodied in the Act. The work begins with an interesting account of the history and principles of usury in all times and in all countries. To any objections that this part is out of place in a legal text-book, Mr. Bellot replies, "that in view of the peculiar character of this statute, based as it is upon ethical principles, no one can pretend to comprehend or administer its provisions who has omitted to examine such principles and the result of their application at various periods and in divers countries." The legislation of the British Colonies on Usury is given, and also that of Germany, Austria-Hungary, Russia, Switzerland and Norway. All of these foreign States have legislated against usury, and in many of them it is punished both civilly and criminally. We should like to call attention to the vigorous language of Professor Von Jhering, quoted on page 91. The fourth chapter deals with "the equitable doctrine giving relief in cases of unconscionable bargains," based largely on the well-known leading case of *Chesterfield v. Janssen*. The fifth chapter is perhaps the most important; it gives the Moneylenders Act 1900, and discusses all the cases that have been decided on it. At the very beginning of the subject we find the learned Author disagrees with the practice of putting moneylending cases in the Short Cause List, and with the



action of Phillimore and Bray, JJ., in refusing a jury in some of such cases. The decision of *Wilton & Co. v. Osborne* is strongly dissented from, as is that in *Barnett v. Corunna*, but perhaps it is a little strong to talk of a learned judge openly displaying his hostility to the policy of an Act. However, as the Court of Appeal over-ruled these cases in *In re a Debtor*, no great harm was done. *Lazarus v. Blake* is another case which the learned Author considers incorrect, nor was *Levene v. Greenwood* quite right. Chapter VI contains a digest of cases under three heads—(1) English, Irish and Scotch cases prior to the Act; (2) English cases in which the equitable doctrine has been applied at Common Law; (3) Digest of English, Irish and Scotch cases since the Act. The judgments in the more important of the cases are given very fully. An important chapter is that on the law of Usury in British India, followed by digests of cases in the various Presidencies. The next two chapters contain the law on the same subject in South Africa and Ceylon respectively, with digests of cases, and the last two chapters are concerned with digests of Canadian and New Zealand cases, and the Conflict of Laws on foreign contracts and foreign judgments. It will be seen that the whole subject is dealt with most fully. We have history, ethics, legislation, decisions from the whole of the British Empire, suggestions for amendments of the law, and remedial measures, such as agricultural credit banks, all set out and considered. The book is to be recommended to the lawyer, the historian, the economist, and the legislator.

**Fourth Edition.** *Tudor on Charities and Mortmain.* By L. S. BRISTOWE, C. A. HUNT, M.A., LL.B., and H. G. BURDETT. London: Sweet & Maxwell. 1906.

It was quite time for a new edition of this work. The third was published under the old name of *Tudor's Charitable Trusts*, as long ago as 1888. Since that time something like seventy Acts of Parliament have been passed which treat more or less of the subject. Among these are some of considerable importance, such as the Mortmain and Charitable Uses Act 1891, the Local Government Act 1894, and the Board of Education Act 1899. There has also been a large increase in the Charity case law. *Re Hunter; Commissioners of Income Tax v. Pemsel*, and *Free Church of Scotland v. Overtoun*, are a few of the important cases that have had to be considered. The arrangement is much the same as the last edition,

but there has been considerable addition and alteration. The book consists of three parts. The first deals with the case-law of the subject, without more references to the statutes than is necessary to explain the cases. The cases are dealt with most carefully, and this is very necessary, as some of them are hard to distinguish; and such subjects as what is a *charitable use*, and the *cy-près* doctrine are by no means easy. The difficulty begins at the very beginning: it is impossible to define what is a legal charity. In the last edition it was stated that a "public trust" and a "charitable trust" were synonymous, but this is not repeated in the present edition. It can only be defined by reference to the statutes of Elizabeth, and "is neither dependent on nor conterminous with its popular sense." This first part covers 426 pages. The second part consists entirely of statutes, divided into various groups, all of which are fully annotated, and this part takes up over 500 pages. A particularly valuable feature of this part is the information given in the notes of the practice of the Charity Commissioners. The third part consists of forms and precedents. Last, but by no means least, comes one of the most satisfactory indexes we have met with. Its fulness can be conjectured when we mention that it occupies very nearly 300 pages, and that the heading "Charity Commissioners" extends over nine pages. The importance of the subject of charitable trusts is shown by the fact that at the end of 1904 the amount of stock vested in the Official Trustee of Charitable Funds was £23,745,788: 17s. 6d., standing to 24,606 separate accounts.

**Fourth Edition.** *Terrell on Patents.* By COURTNEY TERRELL. London: Sweet & Maxwell. 1906.

Mr. Courtney Terrell's new edition of his father's well-known work contains some very important alterations and additions. Since the publication of the last edition the Patents Act 1902 has been passed, which revolutionises the practice of applications for patents and compulsory licences. The change in the practice of applications for patents is of the greatest importance. Though it will give a great deal more trouble and work to applicants, it will much increase the value of the patents when granted, and it will, as Mr. Terrell observes in his Preface, "develop the art of drafting, which up to the present has been neglected." He says later, on the same subject, "Skill in drafting a specification does not consist, as many people seem to suppose, in composing it from insufficient materials

in minimum time, but to a large extent in the ability of the draftsman to obtain from the inventor the necessary facts so as subsequently to determine and indicate in what the invention consists and how to carry it out." Chapter VII is devoted to describing the practice of the Patent Office from the point of view of practical experience, and it cannot be read too carefully by all who are concerned with patents. A difficulty that has had to be surmounted in dealing with the practice generally, is the having in many instances to rely on unreported decisions of the Law Officers. In one instance, where Sir E. Carson is said to have decided in a certain way in an unreported case, and subsequently in another unreported case to have disapproved of his own decision in the former one, it is difficult to arrive at any conclusion as to the proper practice. Another alteration made by the Act of 1902 is an alteration in the practice of granting compulsory licences. Under the Act of 1883 applications for such a purpose were made to the Board of Trade, but now the remedy of any person aggrieved is by petition to the Judicial Committee of the Privy Council, who may order a compulsory licence, or, if they are of opinion that that would be an inadequate remedy, they may revoke the patent. The practice, which is regulated by the Patent Rules 1903 and the Privy Council Rules 1903, is considered in Chapter XIV; but so far no applications have been made under the Act. The principles of the Patent Laws have been developed or explained in many recent cases which are included in this edition. Some of the most important of these are *Ward v. Hill*; *The Anti-Vibration Incandescent Lighting Co. v. Crossley*; *Kopp v. Rosenwald*, and *Brown & Brown, Ltd. v. Hastie*. We notice that Mr. Terrell disapproves of Sir R. Finlay's decision in *re Cooper's Application*. His examination of the cases is very careful and judicious. The index of cases follows an unusual principle, as with each reference to a case is given a clue to the subject on which it is cited. The Appendix contains the statutes and rules, and the very valuable "Instructions to Applicants" issued by the Patent Office.

**Fifth Edition.** *Benjamin on Sale.* By W. C. A. KER, M.A., and A. R. BUTTERWORTH. London: Sweet & Maxwell. 1906.

It must be very unusual for a law book so well established as an authority as *Benjamin on Sale* to go through so much revision on the occasion of the issue of its fifth edition. This can be accounted

for by more than one cause. The book was rapidly written originally, and Mr. Benjamin never had the time to properly revise and correct it. The Editors of the third and fourth editions only made such alterations as were necessary to incorporate recent decisions, but did not interfere with the Author's text. The present Editors have, however, as they say, taken a more liberal view of their duty. They found that there were numberless wrong references, that the quotations were frequently incorrect, and that numerous inaccuracies and some important errors were repeated in each edition. They have therefore spent a considerable part of the last five years in verifying all the references and quotations and thoroughly revising the whole work. The very large amount of re-written matter is distinguished from the Author's text by being enclosed in square brackets. The Sale of Goods Act 1893, which was largely based on Mr. Benjamin's book, has been incorporated in the present work, but the result of the passing of that Act does not seem to have had any material effect in diminishing the size of the volume. Some acute criticism of that Act will be found in the introductory observations. To go in detail through the effects of the learned Editors' revision is impossible, but it may be of interest to our readers to mention some of them. Perhaps the most important difference is on the subject of the unpaid seller's right of re-sale. The Editors have come to the conclusion that the Author's view was "erroneous as well as confused," and that the authorities cited by him, if properly understood, "not only do not bear out, but actually negative, his theory." They have, therefore, substituted a new set of propositions, while reprinting the original propositions and authorities cited *verbatim* at the end of the chapter, with comments in the footnotes. Another part of Mr. Benjamin's work which is somewhat severely criticised, is his treatment of conditions and warranties. The Editors find there both want of logical arrangement and some confusion. These defects they have done their best to remedy by entirely re-arranging the fourth book, paying attention throughout to the distinction between a condition and a warranty, and writing a new chapter on Warranties implied by Law. Many transpositions have been made and additional chapters added. Certain subjects have required fuller treatment, and cases decided in the last thirty-two years have had to be discussed. The Editors are possessed of learning, industry and acumen, and we think the present edition of *Benjamin on Sale* will attain and long keep the highest position as

an authority on its very important subject. We wish in conclusion to guard against being understood to suggest that the Editors do not recognise the great merits of their Author. That they certainly do, and in as far as in them lies they do his memory no ill service, but on the contrary are likely to give a new lease of popularity and influence to his great work. We may point out that reference has not in this edition been confined to the decisions of the Supreme Court and the New York Court of Appeals, but that the Editors have sought to obtain authority on undecided points wherever they could find it.

**Sixth Edition.** *A Treatise on the Law of Master and Servant.* By E. MANLEY SMITH, with notes on the Canadian Law by G. C. FORSTER BOULTON, M.P. London: Sweet & Maxwell. 1906.

In this substantial and well-printed volume the law of Master and Servant is very fully and clearly explained. The expression "master and servant" has been taken in the widest sense of which it is fairly capable, and has been applied to many more relationships than we should have thought of. The Employers' Liability Acts and the Workmen's Compensation Acts are not discussed in the text, but are included in a very useful collection of statutes, which takes up more than 300 pages of the work, and which range from the Fraud by Workmen Act 1748 to the Shipowners' Negligence (Remedies) Act 1905, and are fully annotated. The criminal branch of the subject has been very fully and carefully treated. It is first discussed where the liability of a master to third persons for the acts of his servant in *tort-criminaliter* is considered. The criminal liability of a servant to third persons for acts done on behalf of his master is then dealt with; and there is a whole chapter—the eighth—devoted to offences by servants against their masters. The difficult subject of the difference between larceny and embezzlement is gone into at some length, and a large number of cases carefully considered. The notes on Canadian Law by Mr. Boulton add considerably to the interest and value of the book. The convenient plan is adopted of having separate tables of Canadian cases and statutes; but though of course there is a table of English cases, there is none of English statutes. We have only one fault to find with this valuable book, which is, however, a somewhat serious one. The index is not nearly full enough, and we found difficulty more than once in finding references to subjects we wanted to examine.

**Tenth Edition.** *Taylor on Evidence.* By W. E. HUME-WILLIAMS, LL.B., K.C. 2 vols. London: Sweet & Maxwell. 1906.

**Tenth Edition.** *Best on Evidence.* By J. M. LELY. London: Sweet & Maxwell. 1906.

It is rather curious that two such well-known works on Evidence should at the same time attain their tenth edition. There was more need for such an issue in the case of the former, the last edition of which was published in 1895, than for the latter, the ninth edition of which was issued as lately as 1902. The works are both produced by the same firm, but are in no sense rival publications. Taylor is the great collection of learning on the subject of Evidence, although it is not absolutely exhaustive, as reference to Archbold will show. As an instance of the amount of labour involved in its production, it is enough to turn to note 7 to s. 1,611, and we shall find in that footnote about eight closely printed pages of double columns giving some of the matters, other than those referred to in the text, as to which proof is allowed to be given "by means of certificates or of certified copies of, or extracts from documents." The present learned Editor confesses that modern decisions have compelled him to considerably modify many legal axioms, but as far as possible the original text has been left untouched. We have noted one or two small slips: in one place the Prevention of Cruelty to Children Act 1894 is referred to instead of the Act of 1904 which repealed it, and which Act is itself properly referred to on another page. The allowances to witnesses in criminal cases is also said to be still governed by Sir George Grey's scale, though that was superseded by the regulations issued in June 1904.

A list of abbreviations of various Irish, Scotch, and American authorities is a useful addition to the work, and possesses one feature we have never seen before in a law book, which we cannot describe better than in the Editor's own words: "The letters A., B., C., D., appended to the American Reports, denote the relative estimation in which those Reports are held by the profession in general, out of the particular State where the decisions were pronounced: A. marking the highest degree of excellence. A very eminent American jurist kindly furnished the Author with this guide."

*Best on Evidence* deals with the subject at much less length. The table of cases only covers thirteen pages as against the two

hundred or so of Taylor. It deals fully with principles, and concerns itself less with details. We must not be understood by this to mean that there is not a complete statement of the principles of the law of Evidence, but it is not on the scale of Taylor. The two authorities, as might be expected, do not always agree on disputed points. As an instance, we do not think the two learned Editors have quite the same opinion as to the value of the decision in *Slatterie v. Pooley*. Although the views are cautiously expressed, we think that Mr. Hume-Williams does not approve of it and Mr. Lely does. We find in Best, "It has been said that the law excludes on public grounds, evidence which is indecent, or offensive to public morals, or injurious to the feelings of third persons." This proposition, which is attributed to *Taylor on Evidence*, is then argued against. The reference given to Taylor is incorrect, nor does anything that Taylor says justify it, as what is stated to be excluded is the *unnecessary* disclosure of matter that is indecent, etc. Mr. Lely has added outlines of the *Tichborne* and the *Beck* cases, and dealt more fully with the subjects of perjury, seal of confession, and mistaken identity. On the first subject Mr. Lely makes the following suggestions: (1) the procedure of County Court commitments for perjury should be simplified; (2) the Perjury Act of 1728 should be repealed and re-enacted in a modernised form; (3) as in the Malay Federated States, punishment for perjury might well be brought to the notice of witnesses and deponents on subpoenas and affidavits. On the question of the liability of clergymen to disclose confidential communications acquired in their professional characters, the learned Editors of these two works are at direct issue, and the arguments on each side repay careful perusal.

**Twentieth Edition.** *Williams on Real Property.* By T. CYPRIAN WILLIAMS. London: Sweet & Maxwell. 1906.

**Fifth Edition.** *Goodeve's Modern Law of Real Property.* By Sir H. W. ELPHINSTONE, Bart., M.A., and F. T. MAW, LL.B. London: Sweet & Maxwell. 1906.

In 1882 Mr. Williams largely re-arranged and re-wrote his father's well-known work, and since then has, every few years, issued a new edition incorporating any changes in the law that may have been made. It is easy to see by glancing at the notes how the historical knowledge of the law has been developed since the first edition of

this work was published in 1845. References to the works of Sir F. Pollock, Professor Maitland, Professor Vinogradoff, and to the works of the Selden Society are frequent, and enable any student who desires to do so to extend his knowledge of the history of the law; a subject which is necessarily shortly treated by Mr. Williams. The principal additions to the present edition are those rendered necessary by the issue of the Land Transfer Rules 1903, which will be found in Part VII, which deals with "Land registered under the Land Transfer Acts." We recommend perusal of the last few pages of this work, where Mr. Williams comments on the real property legislation since 1833 in no very favourable terms; especially from the point of view of teachers and students. He points out the pressing need of a reform "which shall not merely change, but really simplify the law."

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*Goodeve's Real Property*, though intended originally for students, has in the course of editions been adapted to the needs of practitioners also. It deals less with the history of the law and treats various branches of law in more detail than Mr. Williams's work. A sufficient testimonial to its merits is the fact that it is one of the books recommended by the University of Oxford and the Council of Legal Education. Sir H. Elphinstone continues to edit it, but in the present edition Mr. Maw takes the place of Mr. J. W. Clark and Mr. A. Dickson. As the last edition came out in 1897 there are necessarily a number of new cases to add. The passing of the Land Transfer Act 1897 has rendered necessary the writing of a new chapter to explain the first part of that Act. Another new chapter has been added on "perpetuities," using that word in the sense of "a future contingent interest which will not necessarily vest within the period allowed by law." Some alterations have been made in the arrangement, such as putting Estates of Inheritance before Estates for Life, and devoting separate chapters to Estates on Condition and Mortgages. Several of the subjects have been discussed at greater length, notably Contingent Remainders. The law is expounded and explained with all Sir H. Elphinstone's well-known learning and lucidity.



*The Yearly Digest of Reported Cases, 1905.* By G. R. HILL, M.A. London : Butterworth & Co. 1906.—A digest of reported cases is a necessity to the practitioner,\* as he cannot satisfy himself with only the digest to the Law Reports or any other reports he may take in. The present purports to be a summary of all reported cases decided during the past year in the Supreme and other English Courts, and a large collection of Scotch and Irish cases. The head-notes are in many cases taken by permission from the reports, and the list of cases over-ruled, considered, etc., considerably increases the utility of the Digest.

*The Elements of Criminal Law and Procedure.* By A. M. WILSHIRE, LL.B. London : Sweet & Maxwell. 1906.—Written for the use of students, this little book is in many ways suitable for that purpose. It is pleasantly and clearly written, and contains a considerable amount of valuable information on the elements of Criminal law. It is stated, not we think in the book itself, but on the paper wrapper, that "the student will find that it contains sufficient information to enable him to pass any examination" in the subjects with which it deals. This may be so, but we are afraid that if he relies on this solely he may get some question he will not answer correctly. For instance, the maximum punishment under sects. 81—84 of the Larceny Act 1861 is seven years' penal servitude, not fourteen : and the important words "to deceive" are left out in the summary of sect. 84. In dealing with cruelty to children, the Act of 1894 is alone alluded to, and no reference is made to the Act of 1904, which repeals and re-enacts with amendments the Act of 1894. In the account of the judges of the Central Criminal Court no mention is made of the two Commissioners. In dealing with the Forfeiture Act 1870, the omission of the little word "or" between "hard labour" and "for more than twelve months" has quite altered the sense.

*Elements of Procedure and Evidence.* By A. M. WILSHIRE, LL.B. London : Sweet & Maxwell. 1906.—The Author of this work has attempted a task of no little difficulty in trying to outline the law of evidence and procedure in an action in the King's Bench Division within the compass of a hundred and sixty small pages. It cannot be said that the result is altogether satisfactory. When, for instance, the Author endeavours to state the law of set-off, he declares that a set-off is distinguished from a counter-claim by several limitations, one of which is, that "the cross-claim must arise out of the same transaction as the claim" (p. 66). The statutes to which the Author refers make it clear that such is not the case ; and the practice of the Courts is equally clear. Again, when giving the rules of evidence, the Author gives citations from the *Criminal Procedure Act 1865* (e.g., p. 159), and he appears to forget that his subject is an *action* in the King's Bench Division. A student nourished on such milk as this will hardly be likely to thrive as well as the old-fashioned lawyer, whose nourishment was derived from Bullen and Leake's *Pleadings* and Roscoe's *Nisi Prius Evidence*. The labour bestowed upon this "outline" must have been immense, but we doubt whether the time given by the Author will be time saved to the student.

*The Jottings of an Old Solicitor.* By Sir JOHN HOLLAMS. London ; John Murray. 1906.—As the Author himself explains, there is very little in this book

of a sensational or dramatic character. Nor can we say that the writer shows himself particularly amusing or interesting as a *raconteur*. Nevertheless we recommend the volume to our readers, as containing valuable matter for the instruction of the mind and the understanding of the law. "Almost everything," says Sir John, as he casts his memory back to 1840, "connected with the law Courts and the administration of the law has changed." Well worthy, therefore, of the attention of the student of law are these early recollections. Old statutes, old cases, old text-books, and the historical portions of modern treatises are available for those who desire precise information of what the Law of England used to be; such information is very easy to obtain if somewhat difficult to assimilate and absorb. What is more valuable and easier at the same time to carry in the memory is a *résumé* of the practical working of these old laws in the every-day practice of the legal profession; especially if it be presented from the point of view of one who was actually "in the thick of it." All the old rules as to proof of handwriting, presumption of lost grants, and so forth, must be studied in memory of this once all-important law. To Sir John Hollams this memory would be always present, and would often help him to understand the decisions of those days, which are still important as precedents to-day. And to a faithful student of the *Jottings* this memory will likewise be foremost for all after time. Again, suppose the lawyer to be inquiring into the law of Discovery for the purpose of an application under the modern Rules of Court. He will find many ancient authorities in the books: but when he has read what Sir John has to say about the ancient practice of filing a bill of discovery and obtaining the common injunction, he will hesitate to apply these ancient authorities in detail to the modern practice. So, throughout these early chapters, there is much to tell the reader of former circumstances, which is well worthy of impressing on the mind as a "living picture;" for every year there are fewer and fewer living originals of the figures on the canvas to remind us of the parts they used to play or rehearse the scenes over again.

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*A Handy Guide to the Statute Law against Drunkenness in England.* By S. FREEMAN. London: Butterworth & Co. 1906.—Statute law in this country has become very voluminous; and the output of "handy guides," which practitioners interested in particular subjects presumably find it worth while to buy, has recently been very large. Much industry has been employed in the instance before us: wherein the law, the procedure and the punishment appropriated to every conceivable circumstance of drunkenness have been extracted—with sufficient notes—from a large number of statutes. There is plenty of material. The problem of drunkenness crops up in all departments of public and private enterprise, among railway servants, among State employes generally, and in the naval and military forces of the Crown. The sections relating to the matter are often buried away in enactments of great length. Here these sections are carefully extracted, summarised and arranged. We consider that a good law library might very usefully include this particular "handy guide," and that much of the information contained in it could only be otherwise discovered by a more tedious process of turning the subject up in the index of several much bulkier books.

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*The Customs Laws.* By N. J. HIGHMORE. London: Stevens & Sons. 1906.—Solicitor for H.M. Customs, and a well-known authority on the subject, Mr.

Highmore is clearly well qualified for his task. In 1876 the various Acts imposing duties were consolidated in the Customs Tariff Act: since then there have been many new duties as well as many alterations in the old ones. In Part I of his book the Author gives a table of the different duties, with a reference in the footnote to the enactment responsible for it. The Consolidation Act is dealt with in Part II; the Acts having reference to particular goods in Part III. Part IV discusses the Isle of Man Customs laws, and Part V a number of miscellaneous Acts. There is a good index; the recent decisions on the subject seem to be included, and the book is well written.

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*The A.B.C. of Parliamentary Procedure.* By W. M. FREEMAN and J. C. ARBOTT. London: Butterworth & Co. 1906.—The Authors dedicate their work to Mr. Joseph Chamberlain, and describe their object as a book which will be of assistance not only to Members of Parliament *in esse* and *in posse*, but also to those interested in Debating Societies. So numerous are these latter that we should think that there is a wide public for a work of this sort. It is produced in a handbook form with alphabetical headings, and so far as we can see, deals with everything essential affecting Parliamentary business. There are appendices dealing with the rules of Debating Societies, the Standing Orders of the House, Unparliamentary Expressions, and so forth. The book will be found useful.

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*The Aliens Act and the Right of Asylum.* By N. W. SIBLEY, LL.M., and A. ELIAS, LL.B. London: Clowes & Sons. 1906.

*The Law of Aliens and Naturalization.* By H. S. Q. HENRIQUES, M.A., B.C.L. London: Butterworth & Co. 1906.—Either of these books will afford the reader all the information which he ought to expect on the subject of the new Act; and both of them contain much interesting historical information besides. Messrs. Sibley and Elias contribute a chapter on "The Right of Asylum" in English law, which is of first-class importance. Lord Hawkesbury's correspondence therein referred to is of peculiar interest, as it is the account of the eloquent defence of the right made by Sir James Mackintosh in the *Peltier Case*. In their first chapter they well point out that "the fact that a prohibition against the landing of foreign immigrants has at length found a place upon the statute book recalls the decided expression of opinion of Lord Herschell, in *Musgrove v. Chun Teeong Toy*,<sup>1</sup> that by International law this country has a right to keep the alien out."

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*The Trade Marks Act 1905.* By D. M. KERLY and F. G. UNDERHAY. London: Sweet & Maxwell. 1906.—The Trade Marks Act was one of the last enactments of the last Parliament, and also the last legislative work of Lord Justice Fletcher Moulton, by whom it was drafted and introduced into the House of Commons. A Select Committee made many amendments in the Bill, the most notable being the Manchester Clause, which makes special provision for the trade marks of the industry in cotton piece goods and yarn, giving statutory recognition to the practice established in connection with the Manchester branch of the Trade Marks Registry of the Patent Office for the registration of marks in the cotton classes. The Act is the fourth English statute dealing with trade marks, the others having been passed in 1875, 1883 and 1888. Notwithstanding these, and

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<sup>1</sup> L. R. [1891], App. Cas. 277.

the liberal construction put on them, the law remained unsatisfactory to the commercial community, as the present Authors point out, and especially on three points: (1) That large numbers of perfectly good and often valuable trade marks were not registrable; (2) that when trade marks were admitted to registration it frequently happened that "disclaimers" were insisted on in the Office which hampered the owner of the marks in getting protection abroad; (3) that there was no effective statute of limitations to objections brought against registered trade marks, so that they were open to attack and were sometimes removed from the register after having been there for years. The new Act is directed at these objections, and also effects an important formal change by separating trade marks from patents and designs, and providing a detailed and nearly complete code of the law relating to registered trade-marks. The book under review deals very fully with the Act, section by section. It is admirably complete, there being an excellent Table showing the Arrangement of Sections, while the Appendices contain the 1883 Act as amended in 1888, the Trade Mark Rules of 1906, and so forth. The book cannot fail to be of use to all interested in this branch of the law.

*The Law of Corporate Executors and Trustees.* By E. K. ALLEN. London: Stevens & Sons. 1906.—This little book, which is dedicated to Sir Nevile Lubbock, K.C.M.G., Governor of the Royal Exchange Assurance, will doubtless, as the Author has been led to expect, prove useful to companies and other corporations which are called on to act as executors or trustees. The book is well written, and the law on the subject is collected into a handy space.

*Dante as a Jurist.* By JAMES WILLIAMS, D.C.L., LL.D. Oxford: B. H. Blackwell. 1906.—"The germ of this little work," says the Author, "appeared in an article in the *Law Magazine and Review* for February, 1897. Since then the writer has studied the subject more thoroughly, and the present essay is the result." To the practising lawyer the bestowal of so much labour on an abstract subject of this kind may appear strange, but doubtless there are some who may be interested by Mr. Williams's excursion, though we are not surprised at the subject not having been touched before in England. Though not a lawyer himself, Dante was the son of a lawyer, and must have breathed a legal atmosphere. It is interesting to learn that Dante and four others were sentenced in 1302 "*tanquam falsarii et barattarii*," a harretor, according to Coke, being "a common mover and exciter or maintainer of suits, quarrels and parts, either in the courts or elsewhere in the country." Whether Mr. Williams makes good the poet's claim to be called a jurist must be a matter of opinion. He groups together a number of legal allusions and phrases used by him in his poems, and certainly adduces some proof of legal learning from his prose works; but probably most readers will agree with Mr. Williams when he says that "Dante is not a Bentham, and the *Divina Commedia* is not a penal code."

*A Manual of Licensing Applications.* By DAVID LIVESEY. London: Butterworth & Co. 1906.—The Author's qualifications for the task he has set himself do not appear on the title-page. The book deals only with applications. Mr. Livesey says that his object is to remedy the difficulty caused by the large number of amending licensing statutes since the Alehouse Act 1828. We do not

think that he has altogether succeeded. We have found a reference to Paterson necessary to elucidate his statement that the ante-1869 beer-houses have an advantage over the post-1869 beer-houses. The statement is correct in itself, but it is surely an essential of a manual such as this assumes to be, to substantiate such statements in the clearest possible language. The Table of Cases has no references to the authorities.

*The Institutes of Justinian.* Translated by J. B. MOYLE, D.C.L. Oxford: The Clarendon Press. 1906.—Mr. Moyle is a distinguished Oxford scholar, and this, the fourth edition of his well-known translation, which was first published in 1883, needs little comment. We do not suppose that the book is designed for or in request by others than the students, but to such it may be cordially recommended as a standard translation of the great jurist. We have often found in translations of ancient and modern books a tendency to slovenliness, and a failure to adjust difficulties occasioned by time or language. It is here that Mr. Moyle's ripe scholarship is shown; his bold "*cy-près*" method of finding the nearest English equivalent for technical terms merits the highest praise.

*Kelly's Conveyancing Draftsman.* Fifth Edition. By L. H. WEST, LL.D., and S. B. SCOTT. London: Butterworth & Co. 1906.—Time has set its imprimatur on this work; and a fifth edition is welcome and should prosper as have its predecessors. The preliminary observations deserve the careful attention of the student; and everything which a beginner desires will be found in the body of the work.

*The Overseer's Handbook.* Sixth Edition. By W. W. MACKENZIE and H. J. COMYNS. London: Butterworth & Co.. 1906.—This most useful book has been revised, and much new matter has been added; the chapter dealing with the recovery of the poor rate having been re-written, while the portion of the book concerned with the levy of contribution by county and district councils has been amplified to indicate the mode in which contributions are obtained by the local education authorities to meet their expenditure under the Education Act 1902. Other additions have been made. The book is too well-known to require much recommendation, but we may call attention to the most handy Calendar of Overseers' Duties in the beginning. Every handbook written for a particular class should contain something of this sort. We would commend to the Authors the desirability of giving the authorities in their Table of Cases.

*A Guide to Criminal Law and Procedure.* Seventh Edition. By CHARLES THWAITES. London: George Barber. 1906.—The first edition of this excellent book appeared in 1886, and the fact of this being the seventh edition is some testimony to its popularity. In the Introduction the Author states that his objects are, firstly, to advise the student on the books to be read; secondly, to give him a general sketch of the elementary points of Criminal law and procedure; and, thirdly, to provide a series of questions by which he may test himself. We consider that these objects are admirably fulfilled. The book has been revised and extended. The only fault we have to find with it is that references to the authorities are not given in the Table of Cases.

## CONTEMPORARY FOREIGN LITERATURE.

*La Derogabilità del Diritto Naturale nella Scolastica.* By Prof. ALESSANDRO BONUCCI. Perugia: 1906.

This interesting essay is an expansion of the motto, *Natura fecit quod potuit aliquod malum tolerans*. Is the law of nature subject to modification, as Azo and others thought, or is it not, as was the opinion of Aquinas? What is the position of the citizen when positive law is in conflict with the law of nature? There is always the difficulty of deciding what the law of nature is. Since the Reformation, says the learned author, it has practically been identified with the individual conscience. His own view is that the law of nature is flexible, *e.g.*, it says, "Thou shalt not kill;" but by the positive law of all systems homicide is permissible in certain cases.

## PERIODICALS.

*Deutsche Juristen-Zeitung.* 1 April—15 June. Berlin: 1906.

At p. 399 is a medico-juristic article on blood analysis, suggesting a more trustworthy means of distinguishing human from other mammalian blood. Dr. Niemeyer discusses the Morocco question from the point of view of International law, and comes to the conclusion that the result of the Algeciras conference will be beneficial to Morocco (p. 446). Dr. Hirschfeld of the English Bar gives a sketch of the Criminal Appeal Bill (p. 592). Dr. E. Freund of Chicago thinks that there is no country in the world where law and politics are as interdependent as the United States. Accordingly the coming struggle between the Government and the Trusts is of unusual interest to lawyers, especially as the Trusts bring much grist to the professional mill (p. 636).

*Giustizia Penale.* 22 March—14 June. Rome: 1906.

A long article on limitation in criminal prosecutions could hardly have appeared in an English periodical. Such an article would have been well-nigh impossible in a country the legal system of which allows limitation only in a few exceptional cases, such as treason and customs offences. Nor could the crime mentioned at p. 628 have come before the English Courts. There the communal druggist was convicted for absenting himself from his commune without

leave. At p. 496 there is a long and interesting report of the judgment of the Corte della Cassazione in favour of the jurisdiction of the Consular Court at Smyrna. The accused had been convicted by the Consular Court of adulterating quinine with boracic acid. It was argued in vain on his behalf that this being an offence against the public health was not within the scope of the treaties between Italy and the Sublime Porte defining the criminal jurisdiction of the Consular Court over Italian subjects.

*Zeitschrift für Internationales 'Privat-und Öffentliches Recht.*  
Vol. XVI, Parts 2—4. Leipsic: 1906.

The most noticeable articles are one by Prof. Schücking, of Marburg, against the use of submarine mines in warfare, and another by Dr. Wittmaack of Leipsic, on the failure of the Chinese immigration laws in the United States. They have sowed the wind, says he, and have reaped the whirlwind. Among the reported German cases is an interesting one, that where X, a German, emigrates to the United States, and there duly and by legal means changes his name to Y., he is still Y. on his return to Germany (p. 34). "Henry Clay & Bock & Co. Limited" brought an action against a German automatic machine company for breach of the plaintiff's trade-mark, and for selling reputed "Henry Clays" in their automatic machine at a price below real "Henry Clays." The action was dismissed on several grounds, one being that there was no colourable imitation (p. 349).

JAMES WILLIAMS.

Books received, reviews of which have been held over owing to pressure on space:—*Encyclopædia of Local Government Law, Vol. II*; *Digest of English Civil Law*; *The Spirit of our Laws*; Jitta's *La Substance des Obligations dans le Droit International Privé, Vol. I*; Witt's *Life in the Law*; Demarest's *Hints for Forensic Practice*; Clark's *Roman Private Law, Part I*; Thatcher's *Students' Handbook of Local Government Law*; *Encyclopædia of Forms and Precedents, Vol. XI*; Hurst's *Principles of Commercial Law*; Macgillivray's *Digest of the Law of Copyright*; Pollock's *Notes and Introduction to Maine's "Ancient Law"*; Holland's *Elements of Jurisprudence*.

Other publications received:—*Judicial Statistics, 1904, Part II*; *The University Review* (Sherratt & Hughes); Keen's *Parliamentary Companies*; *The Law Association Centennial, 1802—1902* (Law Association of Philadelphia); *The Liberal Victory* (Eighty Club); *Rivista di Diritto Internazionale*; *The Rights of Neutrals as illustrated by recent events* (Henry Frowde); Amadori Virgil's *Il Sentimento Imperialista*; *La Cassazione Unica*; *Humane Review*; Salt's *Ethics of Corporal Punishment*.











